Supreme Court, U.S.
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No. 10-

IN THE

Supreme Court of the United States

BRANDON MAYFIELD, an individual, MONA MAYFIELD, an individual, and SHANE MAYFIELD, SHARIA MAYFIELD, and SAMIR MAYFIELD, individuals, by and through their *guardian ad litem* Mona Mayfield,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

ELDEN M. ROSENTHAL
ROSENTHAL & GREEN, P.C.
121 S.W. Salmon Street
Suite 1090
Portland, OR 97204
(503) 228-3015

GERRY SPENCE
THE SPENCE LAW FIRM, LLC
15 South Jackson Street
P.O. Box 548
Jackson, WY 83001
(800) 967-2117

ANDRE M. MURA *
ROBERT S. PECK
JEFFREY R. WHITE
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
777 Sixth Street, N.W.
Suite 520
Washington, DC 20001
(202) 944-2860
andre.mura@cclfirm.com

Counsel for Petitioners

*Counsel of Record

Additional counsel listed on inside cover

MICHELE LONGO EDER
MICHELE LONGO EDER, LLC
4 S.W. High Street
P.O. Box 1530
Newport, OR 97365
(541) 265-3337

QUESTIONS PRESENTED

1. Whether, if the United States seizes and seeks to keep indefinitely property in which Petitioners have a possessory interest, thereby causing them to suffer an ongoing injury, and where a partial settlement with the federal government included consent to seek declaratory relief, Petitioners have standing to seek a declaratory judgment that the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1804, 1823 ("FISA"), which authorized the seizures, violates the Fourth Amendment.

2. Whether, upon concluding that Petitioners are suffering an ongoing injury due to the retention of property seized pursuant to FISA, the Ninth Circuit erred in holding, contrary to decisions of this Court and other Circuits, that a declaratory judgment against the federal government, standing alone, fails to satisfy Article III redressability requirements if not coupled with coercive relief.

PARTIES TO THE PROCEEDINGS

The caption of the case contains the names of all the parties. *See* Sup. Ct. R. 14(1)(b).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The District Court's opinion is reported at 504 F. Supp. 2d 1023 (D. Or. 2007), and is reproduced at App. 1a. The opinion of the U.S. Court of Appeals for the Ninth Circuit is reported at 599 F.3d 964 (9th Cir. 2010), and is reproduced at App. 58a.

JURISDICTION

The judgment of the Ninth Circuit was originally issued on December 10, 2009. App. 41a. The original decision was subsequently vacated, and a new decision issued on March 24, 2010 (App. 58a), at which time the Ninth Circuit also denied the Petitioners' timely motion for rehearing en banc. App. 58a. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1804, 1823 is reproduced at App. 95a. The Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202 is reproduced at App. 94a.

INTRODUCTION

On March 11, 2004, a series of terrorist bombings struck the Madrid, Spain commuter rail system, killing 191 people and wounding another 1600. Spanish authorities immediately suspected al-Qaeda as the responsible party. The Federal Bureau of Investigation assisted Spain in the investigation. Soon after the bombings, Spanish law enforcement authorities lifted a partial fingerprint from evidence connected to the bombings, and shared a digital copy of the print with the FBI. The FBI traced the print to Petitioner Brandon Mayfield, an American lawyer who had not been out of the country for a decade. The Spanish police, with the original print in hand, disagreed, and they informed the FBI that the prints did not in fact match.

For two weeks, the United States secretly surveilled and recorded the most intimate moments of an American family, the Mayfields. Government agents photographed the interior of their home and of Brandon Mayfield's law office, and rummaged through their personal and professional papers, including client files of Brandon Mayfield's family and immigration law practice, as well as the Mayfield children's homework. A vast trove of the Mayfields' private information remains in the United States' possession to this day. The government refuses to return or destroy these materials, even though it admits that the Mayfields are in no way connected to the events that prompted the Foreign

Intelligence Surveillance Act searches and seizures in the first place; even though Spanish authorities identified responsible parties unconnected in any way to the Mayfields; and even though the government has no justification for retaining these materials.

The investigation, arrest, and continuing injury visited upon the Mayfields were unwarranted and illegal, lacking even a modicum of probable cause. The United States partially settled the Mayfields' 42 U.S.C. § 1983 damages suit, the settlement of which reserved Mayfield's right to seek a declaratory judgment that the federal law upon which the FBI relied as authority for their search and seizure was unconstitutional.

The Mayfields then sought such a declaration. The District Court declared the FISA provisions unconstitutional, but the U.S. Court of Appeals for the Ninth Circuit, despite recognizing the Mayfields' ongoing injury, held that a declaratory judgment alone would not compel the government to return or destroy these materials, and thus the Mayfields lacked standing to institute this action. The Court of Appeals' legal conclusions essentially grant federal law enforcement an unprecedented authority to retain intimate information over which the Mayfields retain a possessory interest—information that it would not have collected but for the illegal searches and seizures. This Court has never permitted the United States to seize and keep indefinitely sensitive materials over which a person has a possessory interest, in the absence of a law enforcement justification for doing so. It should reject that assertion of power here and resolve the circuit split on the value of a declaratory judgment.

STATEMENT OF THE CASE

Following the Madrid train bombings in 2004, the FBI erroneously concluded that Petitioner Brandon Mayfield's fingerprint, taken when he was in the United States Army, matched a digital photo of a fingerprint lifted from a bag of detonators found near the Madrid station. The Spanish police, with the original in hand, concluded that the prints did not match. Mayfield, a solo family and immigration law attorney in Oregon and a Muslim, had not left the United States since 1994. Yet FBI agents proceeded to surveil the Mayfields, and to search his home and law office, for two weeks, pursuant to a warrant they obtained under the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1804, 1823 ("FISA"), which permits the collection of foreign intelligence information so long as intelligence gathering is a "significant purpose" of the investigation.

Through FISA, the federal government focused its investigatory resources on the Mayfield family. The family's most intimate conversations were recorded. When the FBI thought the Mayfields were not at home or at work, agents surreptitiously entered their house and Mr. Mayfield's law office, looking at and copying their personal and private documents, legal files, and computer hard drives, including his children's homework. The FBI also took hundreds of photographs inside the Mayfield home, and inside Mr. Mayfield's law office.

The Mayfields knew nothing of this surveillance until after Brandon Mayfield was arrested and told he was the prime suspect in a crime punishable by death. Two weeks after

Mayfield's arrest, the Spanish police matched the fingerprint to a different individual. Mayfield was then released.

The United States ultimately settled the Mayfields' 42 U.S.C. § 1983 damages lawsuit and returned much, but not all, it had seized. The United States retained, without explanation, so-called derivative materials, which may include

> photocopies or photographs of documents from confidential client files in Mayfield's law office, summaries and excerpts from the computer hard drives from the Mayfield law office and plaintiffs' personal computers at home, analysis of plaintiffs' personal bank records and bank records from Mayfield's law office, analysis of client lists, websites visited, family financial activity, summaries of confidential conversations between husband and wife, parents and children, and other private activities of a family's life within their home. These materials, in a derivative form, have been distributed to various government agencies.

App. 20a-21a.[1]

Because the settlement agreement explicitly preserved a claim for declaratory relief that provisions of FISA are facially unconstitutional, the

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[1] This list does not purport to be exhaustive. The government has never provided the Mayfields with an inventory of the materials it has retained.

Mayfields filed an amended complaint. The District Court concluded that the suit was justiciable and held the challenged provisions of FISA unconstitutional under the Fourth Amendment. The Court of Appeals reversed. Although it found that the government's retention of these materials continues to injure the Mayfields, and that the injury is "due to" the FISA searches and seizures, App. 70a-71a, it concluded that the injury was not redressable, for two reasons. First, it said that a judgment declaring that provisions of FISA, which had authorized the seizure, violate the Fourth Amendment would not itself require the government to return or destroy the seized property. Second, it found that the District Court lacks authority to order the return itself. App. 74a.

REASONS FOR GRANTING THE PETITION

Review by this Court is warranted for two reasons. First, as an issue of great national importance, the Court of Appeals' conclusion that the Mayfields lack standing to claim the protections of the Fourth Amendment—here, for the return of materials containing sensitive information in which they have a possessory interest—is, in effect, a conclusion that the Fourth Amendment does not bar the government from keeping indefinitely property it has seized illegally, even where it has asserted no justification for doing so. *See United States v. Salvucci*, 448 U.S. 83, 88 n.4 (1980) (recognizing that in *Rakas v. Illinois*, 439 U.S. 128, 139 (1978), "this Court discarded reliance on concepts of 'standing' in determining whether a defendant" may claim Fourth Amendment protections, and instead inquires "simply whether the defendant's rights were violated by the allegedly illegal search or seizure."). The

Ninth Circuit's decision undermines holdings of this Court. In the guise of standing, the decision below permits the government to retain indefinitely what the Court of Appeals understood to be materials in which the Mayfields have possessory interests. *See* App. 71a (finding an injury due to the government's retention of these materials). The court reached that conclusion even though the government's contention that it may retain these materials indefinitely is patently unreasonable. That decision is wrong and "risk[s] creating an unwarranted gap in the constitutional protections that exist with respect to governmental takings of property." *Lee v. City of Chicago*, 330 F.3d 456, 472 (7th Cir. 2003) (Wood, J., concurring).

Had the Court of Appeals followed other circuits in looking only to the Fourth Amendment's reasonableness requirement, the Court would have afforded Mayfield his day in court. Contrary to the Ninth Circuit's approach, the legality of the seizure is a consideration material to whether the retention is reasonable; indeed, the legality of the seizure speaks to which party may have a superior interest in the property that the government seeks to retain. *See Warden v. Hayden*, 387 U.S. 294, 304 (1967) (explaining that, at common law, "redress for persons aggrieved by searches and seizures, depended upon proof of a superior property interest. And since a lawful seizure presupposed a superior claim, it was inconceivable that a person could recover property lawfully seized.") (discussing *Entick v. Carrington*, 19 How. St. Tr. 1029, 1066 (1765)).[2]

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[2] Although *Warden* remarked that "[t]he premise that property interests control the right of the Government to search

This Court has made it clear that the Fourth Amendment is implicated by a seizure of property, which "occurs where there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). The Ninth Circuit ignored this teaching. Where the seizure is in fact illegal (as the District Court found) and the government offers no justification at all for retaining the illegally seized property, the Fourth Amendment *itself* requires the government to return the property—just as it requires the government to release a person whom it has no justification to retain. Thus, contrary to the Court of Appeals' conclusion, a declaration of unconstitutionality would redress the Mayfields' injuries by making it substantially likely that a government committed to the rule of law would return or destroy these materials.

Review is warranted for a second reason as well. The Court of Appeals erred in holding that the District Court lacked power to redress the Mayfields' injuries. As such, the Ninth Circuit's crabbed view of inherent judicial authority to provide a remedy constitutes a significant reduction in the authority of

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and seize has been discredited," *id.* at 304, this Court's subsequent decision in *Soldal v. Cook County*, 506 U.S. 56 (1992), clarifies that *Warden* did not "snuff[] out the previously recognized protection for property under the Fourth Amendment." *Soldal*, 506 U.S. at 64. Accordingly, *Warden*, though it rejects the view that the Government could seize *only* property that "the private citizen was not permitted to possess," 387 U.S. at 303 (quoting John Kaplan, *Search and Seizure: A No-Man's Land in the Criminal Law*, 49 Cal. L. Rev. 474, 475 (1961)), should not be read to mean that superior interests in property are irrelevant to the issue of whether the government can seize and retain property.

our courts. That error is particularly pronounced given its separate finding that the Mayfields suffer an ongoing injury that is caused by the challenged provisions of FISA.[3] In the court's narrow view, only a coercive injunction against the government could insure the return or destruction of the materials held by the government. App. 72a. But the Mayfields and the United States in their partial settlement agreed that a declaratory judgment could go forward, just that injunctive relief could not be sought. In the Ninth Circuit's view this was fatal to the Mayfields' cause. Even if they prevailed in their declaratory judgment action, the court reasoned, "[t]he government will not be required to act in any way that will redress the Mayfields' past injuries or prevent likely future injuries." App. 72a. Moreover, according to the Court of Appeals, the District Court lacked any other authority to require the government to act. *Id.* Thus, "in light of the limited remedy available to Mayfield, he does not have standing to pursue his Fourth Amendment claim." App. 60a.

The Ninth Circuit's departure from the views of other courts demonstrates its error both in the heavy burden it imposed on litigants to demonstrate redressability and in its narrow view of the District Court's authority under the Declaratory Judgment Act. The ruling contravenes the established

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[3] Specifically, the Ninth Circuit held that the Mayfields continue to suffer an ongoing injury that "is likely to recur" both because it stems from "a written policy" of the government and because it is part of a 'pattern of officially sanctioned . . . behavior, violative of the plaintiffs' [federal] rights.'" App. 70a-71a (quoting *Armstrong v. Davis*, 275 F.3d 849, 861 (9th Cir. 2001)). It also agreed with the District Court that the "ongoing injury [is] due to the government's continued retention of derivative material from the FISA seizure." *Id.*

precedents of this Court and undermines a core purpose of the Declaratory Judgment Act—to vest district courts with broad and flexible authority in order that they may uphold federal rights.

I. WHETHER FOURTH AMENDMENT PROTECTIONS EXTEND TO THE GOVERNMENT'S RETENTION OF SEIZED PROPERTY IS A QUESTION OF FUNDAMENTAL IMPORTANCE THAT HAS PRODUCED CONFLICTING VIEWS IN THE LOWER COURTS.

The lower courts are starkly conflicted about whether the Fourth Amendment bars the government from keeping property it has seized indefinitely, even where it lacks a justification for doing so. On the one hand, the D.C. and Eleventh Circuits have found—and properly so—that the Fourth Amendment would command the property's return when the government lacks a justification for keeping it. *United States v. Wilson*, 540 F.2d 1100 (D.C. Cir. 1976); *Bruce v. Beary*, 498 F.3d 1232 (11th Cir. 2007). On the other hand, the Second and Seventh Circuits, like the Ninth in this case, believe that the Fourth Amendment is simply inapplicable to a decision to refuse to relinquish seized property once the government has no need for it. *United States v. Jakobetz*, 955 F.2d 786 (2d Cir. 1992); *Lee*, 330 F.3d 456. At the same time, the Sixth Circuit has expressed internally conflicting views on the issue, concluding in one case that the Fourth Amendment commands the return of seized documents (both originals and any copies made), and in another (over dissent) that the Fourth Amendment is irrelevant to the issue of return. *Compare Sovereign News Co. v. United States*, 690 F.2d 569 (6th Cir. 1982), *with Fox*

v. Van Oosterum, 176 F.3d 342 (6th Cir. 1999). This Court's review is thus needed to resolve this conflict. *See* Sup. Ct. R. 10(a).

Consider first the cases finding the Fourth Amendment to be applicable in this context. In *Wilson*, the D.C. Circuit considered whether a district court has both "the jurisdiction and the duty" to return to a defendant property seized during a criminal investigation, where the property was not alleged to have been stolen, was not contraband, and was no longer needed as evidence. *Id.* at 1101. It concluded that the government could not retain property that was not "otherwise forfeitable" in the absence of a reason for doing so. *Id.* at 1104. Although *Wilson* did not explicitly cite to the Fourth Amendment for this proposition, its analysis trained on the reasonableness of the return—reasonableness being the touchstone of the Fourth Amendment. *See Ohio v. Robinette*, 519 U.S. 33, 39 (1996).

Similarly, the Eleventh Circuit has found that, if an initial seizure of property by officers constituted an *illegal* seizure then "[c]ertainly, the continued retention of . . . [that] property . . . would be a constitutional violation as well." *Bruce*, 498 F.3d at 1248. *Bruce* concerned a § 1983 suit against a county sheriff and individual officers for damages resulting from the administrative search of an auto-body repair shop. The court agreed with the shop's owner that the "administrative search . . . exceeded its limited scope and was, therefore, unreasonable, as

was the seizure of his property and the refusal to return it."[4] *Id.*

Finally, the Sixth Circuit, in *Sovereign News*, considered the reasonableness of the government's retention of originals and copies of business records it had lawfully seized. Balancing the possessory interests in the documents and copies with the government's interests in retention, the court found that their continued retention would be unreasonable. Thus, it held that "when the government has held the copies for a 'reasonable time' and has no investigations in progress, it *must* return the copies as well as the originals." *Id.* at 577 (emphasis added).

On the other side of the ledger are decisions in the Second and Seventh Circuits finding that the retention of property following a seizure does not implicate the Fourth Amendment. For instance, in *Jakobetz*, the Second Circuit considered whether the use of a defendant's photograph in a photo array was improper because it was wrongfully acquired—an acquisition that the defendant likened to an illegal seizure. The photo was taken during an earlier investigation of unrelated charges. State law required that the photo be returned to the defendant following the termination of a criminal prosecution. The defendant's photo, however, was never returned,

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[4] The Eleventh Circuit has also said that the unreasonable retention of seized materials violates due process. *Case v. Eslinger*, 555 F.3d 1317, 1330 (11th Cir. 2009). But given the "explicit textual source of constitutional protection" against seizures of property, the unreasonable retention of materials is best understood as a Fourth Amendment violation, and not a due process violation. *See Graham v. Conner*, 490 U.S. 386, 395 (1989).

and thus, according to him, the continued possession of the photo by police constituted an illegal seizure. The *Jakobetz* court rejected that "novel" argument, because, in its view, the "seizure alleged is [not] one that deserves the special protections provided by the fourth amendment," and because it found no authority to the contrary. 955 F.2d at 802.

In *Lee*, the Seventh Circuit considered whether a state actor's refusal to return once lawfully obtained property can amount to an unreasonable seizure, or, alternatively, transform a seizure from reasonable to unreasonable." 330 F.3d at 460 (noting that the question was one of first impression in the Circuit). In that case, the City of Chicago had impounded Lee's car for evidentiary purposes, a seizure which all agreed was reasonable, but when the city no longer had a need for the car, it refused to return Lee's property to him unless he paid the car's towing and storage fees or requested a hearing. Lee filed suit pursuant to § 1983 alleging that the city had violated his Fourth Amendment right to be free from an unreasonable seizure by requiring him, as the owner of the vehicle, to pay fees to reclaim his car. The court held that the Fourth Amendment is irrelevant to the reasonableness of a decision to refuse to relinquish seized property once the government has no need for it." *Id.* at 472 (Wood, J., concurring). In its view, which was drawn from *Wilkins v. May*, 872 F.2d 190, 192-195 (7th Cir. 1989), the text of the Fourth Amendment itself imposes a temporal limitation on what may qualify as a seizure: "the right 'to be secure' in one's home, person, or effects," the court explained, "suggests a *state of being* that is protected against intrusion by unlawful government action."

330 F.3d at 462 (emphasis in original); *see also Wilkins*, 872 F.3d at 192-93. That state of being, according to the court, occurs at the initial point of seizure, and at no other point. *See* 330 F.3d. at 462. The court found additional support for that literal reading of "seizure" in dictionary definitions extant at the time of the Amendment's drafting. *Id.*

Judge Wood, however, in a concurrence, strongly questioned the wisdom of holding that the Fourth Amendment is "utterly irrelevant" to such governmental takings, noting that such a view risked "creating an unwarranted gap in the constitutional protections that exist with respect to governmental takings of property." *Id.* at 472. And she questioned the majority's temporal understanding of the word "seizure," noting that "[t]he word "seizure" also implies that the property is being held long enough to ensure that it will not be recaptured." *Id.* at 474. Thus, Judge Wood concluded:

> [T]he protection of private property is a high enough value in the Constitution that I would hesitate long before I concluded that there were no constitutional restrictions on the State's power to seize property and keep it (or to do the equivalent by imposing such a costly condition on the recovery of the property that it is functionally unavailable to the owner). At least when the "second seizure" characterization is apt, I believe that the Fourth Amendment's prohibitions against unreasonable seizures are triggered.

Id. at 476-77.[5]

Lastly, the Sixth Circuit, in *Fox*, held that the retention of property legally seized does not implicate the Fourth Amendment. *Fox* concerned a § 1983 suit in which a plaintiff alleged that county officials had violated his Fourth Amendment rights by refusing to return his suspended driver's license despite his having paid off the traffic citations that led to the initial seizure. The court found no Fourth Amendment violation because, on its reading, this Court had only considered whether state action meaningfully interferes with possessory interests in cases where the conduct at issue involved the initial act of "taking property away." 176 F.3d at 350.

In dissent, Judge Clay disagreed with this reading of this Court's decisions, finding instead that they demonstrated that a seizure may exist even after the initial taking. By way of example, the dissent cited *United States v. Place*, 462 U.S. 696 (1983), in which this Court "found that while the detention of a traveler's luggage did not initially, at the precise moment of seizure, violate the Fourth Amendment, the retention of that luggage for over

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[5] In addition, Judge Wood briefly considered whether, if the Fourth Amendment does not provide a remedy, the Fifth Amendment's Takings Clause could—even though Lee had not made a takings claim. Judge Wood surmised that "a plaintiff might be able to assert a claim under the Fifth Amendment's Takings Clause." 330 F.3d at 477. Nonetheless, the Fourth Amendment appears to provide the most realistic constitutional remedy for people whose property is taken by the government and not properly returned. Absent the application of the Fourth Amendment here, there will in fact exist "an unwarranted gap in the constitutional protections that exist with respect to governmental takings of property." 330 F.3d at 472 (Wood, J., concurring).

ninety minutes rendered the seizure unreasonable and violated the Fourth Amendment." 176 F.3d at 355 (Clay, J., dissenting) (citing 462 U.S. at 710). The dissent also noted that the Advisory Committee's Note to Federal Rule of Criminal Procedure 41(e), which establishes procedures for a motion to return property, itself cites *United States v. Place* in support of the proposition that "reasonableness under all the circumstances must be the test when a person seeks to obtain the return of property." Fed. R. Crim. P. 41(e), Advisory Comm. Note. Thus, the dissent concluded that, contrary to the majority's view, "the general principle that 'seized property, other than contraband, should be returned to the rightful owner after the criminal proceedings have terminated,' *United States v. Francis*, 646 F.2d 251, 262 (6th Cir. 1981), invokes the standards of the Fourth Amendment by implementing the type of balancing test set forth in *Place*." 176 F.3d at 356. That, the dissent noted, is precisely the approach that the Circuit's prior decision in *Sovereign News*, 690 F.2d at 577, had endorsed. *See* 176 F.3d at 356.

Given these conflicting decisions, this Court's review is warranted. But even in the absence of a conflict, review would nonetheless be warranted because of the importance of the constitutional question presented, which the Court of Appeals has resolved in a way that conflicts with this Court's own understanding of the Fourth Amendment. *See* Sup. Ct. R. 10(c).

Critically, the view that retention of property following a seizure does not itself constitute a second or continuing seizure, and thus does not implicate the Fourth Amendment's reasonableness standard,

is at odds with this Court's understanding of a "seizure." As this Court explained in *Jacobsen*, 466 U.S. at 113, "[a] 'seizure' of property occurs where there is some meaningful interference with an individual's possessory interests in that property." *Id.* As to persons, meaningful interference occurs when a person is "seized," and the seizure continues past the initial point of arrest. *E.g.*, *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (holding that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to any extended restraint on liberty following an arrest); *see also Albright v. Oliver*, 510 U.S. 266, 274 (1994) (plurality opinion) (stating that "the Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it."); *Albright*, 510 U.S. at 277-79 (Ginsburg, J., concurring) (reasoning that as long as a Fourth Amendment interest, such as liberty, is being infringed, a person is being "seized" even if she is not technically being detained). How far beyond the point of arrest do such protections extend? That is unclear.[6] *See Graham*, 490 U.S. at 395 n.10 (leaving for another day the question whether the Fourth Amendment continues

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[6] Lower courts that have considered the issue largely agree that a seizure of a person may occur past the point of initial arrest. *See, e.g.*, *Phelps v. Coy*, 286 F.3d 295, 300 (6th Cir. 2002) (concluding that "the seizure that occurs when a person is arrested continues [throughout the time] the person remains in the custody of the arresting officers" (internal quotation marks and citations omitted)); *Powell v. Gardner*, 891 F.2d 1039, 1044 (2d Cir. 1989) (stating that the "Fourth Amendment standard probably should be applied at least to the period prior to the time when the person arrested is arraigned or formally charged"); *Robins v. Harum*, 773 F.2d 1004, 1010 (9th Cir. 1985) (stating that "once a seizure has occurred, it continues throughout the time the arrestee is in custody of the arresting officers"); *but see Wilkins*, 872 F.2d at 190.

to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins). But what is clear is that this Court's cases reject the view that a seizure of a person cannot occur after the initial point of seizing.

Similarly, the view that the retention of seized property is never itself a "seizure" in a constitutionally relevant sense cannot be correct. The Court should therefore consider whether the government's retention of these materials is a seizure and thus must be reasonable under the Fourth Amendment, and find that the Mayfields have standing to seek a declaration that the seizure is illegal and thus the retention unreasonable.

II. CERTIORARI IS WARRANTED TO REVIEW THE COURT OF APPEALS' DECISION THAT A DISTRICT COURT IS WITHOUT POWER TO REDRESS PETITIONERS' ONGOING INJURIES BY A DECLARATORY JUDGMENT.

A. The Ninth Circuit's Insistence that a Declaratory Judgment Redress All the Alleged Injury Contravenes this Court's Definition of "Redressability."

The purpose of the redressability requirement is to confer standing on one who "personally would benefit in a tangible way from the court's intervention," *Warth v. Seldin*, 422 U.S. 490, 508 (1975), as distinguished from one having only an "undifferentiated public interest" in seeing the rule of law upheld. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 106-07 (1998). A plaintiff's burden of

making this showing "is relatively modest." *Bennett v. Spear*, 520 U.S. 154, 171 (1997). Additionally, "[a]t the pleading stage, general factual allegations . . . may suffice" *Id.* at 168 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

The Court of Appeals asserted that without an injunction ordering the government to return or destroy the derivative materials, "a declaratory judgment would not likely impact [Mayfield] or his family," App. 60a. However, the terms of the settlement agreement itself obligated the government to provide redress of at least some of Mayfield's injury if he prevailed on his complaint seeking a declaratory judgment.

The Mayfields were understandably frightened and upset when they learned that their home had been repeatedly broken into, their computers searched, and listening devices installed—all on the authority of FISA, 50 U.S.C. §§ 1804 and 1823, as amended by the Patriot Act. App. 86a ¶ 9. Moreover, the government utilized those same challenged provisions as authority for its refusal to destroy the derivative materials, to retain the information in its files, and to disseminate the information to agencies within the government. App. 90a-91a ¶¶ 23 & 25. The Mayfields reasonably allege that they presently "fear the future uses of FISA" against them. *Id.* at ¶ 25.

The ongoing injury to Mr. Mayfield professionally is even more tangible and direct. The government installed electronic listening devices in Mayfield's law office, conducted covert searches of the office, and photographed and kept copies of confidential client files. App. 86a, 88a ¶¶ 9 & 11-13.

Mayfield thus justifiably fears that client confidences may have been compromised and has lost a significant measure of good will in keeping client confidences against future business opportunities with new clients. His immigration clients would understandably be concerned. The government's apparent reliance on the challenged FISA provisions to justify such intrusions comprises the gist of a continuing injury that is more than sufficient to confer standing. Certainly his allegation that he fears the government may once again use §§ 1804 or 1823 against him in his law practice is neither insubstantial nor frivolous.[7] As Circuit Judge Ronald Lee Gilman has pointed out, the possibility of surveillance has an immediate practical effect on an attorney's practice of law. Due to the secrecy surrounding FISA-authorized surveillance, attorneys who have attracted the government's interest cannot be certain whether their attorney-client communications might be intercepted. "In the face of this uncertainty, the attorney-plaintiffs must presume [that communications may be disclosed], lest they run the risk of revealing confidential and possibly incriminating information directly to the government." *ACLU v. Nat'l Sec. Agency*, 493 F.3d 644, 705 (6th Cir. 2007) (Gilman, J., dissenting). Indeed, the statute itself contemplates seizure of privileged documents and communications. 28 U.S.C. § 1806. Consequently, Mayfield's ongoing and

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[7] The federal court may assume subject matter jurisdiction so long as plaintiff's claim is not "so attenuated and unsubstantial as to be absolutely devoid of merit." *Baker v. Carr*, 369 U.S. 186, 199 (1962). If "the complaint, on its face, asserts a non-frivolous claim . . . the District Court is then empowered to assume jurisdiction and to determine whether the claim is good or bad." *Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186, 213 n.9 (1974) (citations omitted).

legitimate concern that §§ 1804 or 1823 may again be used against him requires him to be circumspect in his communications with his clients, and to advise his clients of the possibility that their communications might be subject to surveillance, thereby hampering his zealous representation.

For these reasons, the Ninth Circuit acknowledged, the "purpose of the desired declaratory judgment was thus twofold: 1) to prevent future uses of FISA against Mayfield [and his family]; and 2) to force the government to return or destroy all derivative materials in its possession obtained from Mayfield by unconstitutional means." App. 67a.

The declaratory judgment Mayfield seeks would certainly satisfy the first claim for redress. In its settlement with Mayfield, the government stipulated not only that Mayfield could seek a declaratory judgment challenging 50 U.S .C. §§ 1804 and 1823 on Fourth Amendment grounds, but also explicitly agreed that "if such a declaratory judgment is entered with respect to one or both of such provisions and becomes final and not subject to further judicial review, *the United States shall not use such provision(s) with respect to the plaintiffs.*" App. 79a-80a ¶ 8 (emphasis added).[8]

The court below plainly erred in concluding that "[i]f the statutes challenged by Mayfield were declared unconstitutional, there will be no direct

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[8] Indeed, the government conceded in the District Court "that such a declaratory judgment would protect plaintiffs against future searches or surveillance targeting them." App. 20a.

consequence to him." App. 72a. As this Court has stated, "[i]t can scarcely be doubted that, for a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress." *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167, 185-86 (2000). This is not a case where plaintiff is "seeking relief that no more directly and tangibly benefits him than it does the public at large." *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (quoting *Lujan*, 504 U.S. at 573-74).

Contrary to the lower court's view, Mayfield need not demonstrate that the requested relief would redress his entire injury.[9] Rather, a "plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury." *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) (emphasis in original); *see also Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976) ("[T]he relevant inquiry is whether . . . the plaintiff has shown *an* injury to himself that is likely to be redressed by a favorable decision.") (emphasis added); *Kunkel v. Cont'l Cas. Co.*, 866 F.2d 1269 (10th Cir. 1989) (A declaration of rights need not include injunctive or monetary relief,

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[9] Petitioners suggest that, by triggering the government's obligation not to use the challenged provisions against them, a declaratory judgment would also redress the second part of the alleged injury by eliminating the FISA provisions as justification for the government's continued retention of the derivative materials. *See* part B, *infra*.

nor need the relief granted entirely dispose of the matter).

If permitted to stand, the decision below will undermine the purpose of the standing inquiry, which is not to erect barriers to those who seek legal redress. Rather, in a statement of principle that this Court has adhered to for nearly half a century, it is to assure that they have "'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 72 (1978) (quoting *Baker*, 369 U.S. at 204)); *see also Mass. v. E.P.A.*, 549 U.S. 497, 517 (2007). Mayfield has surely demonstrated such a personal stake.

B. The Court of Appeals' Insistence that a Declaratory Judgment Require the Government to Redress the Alleged Injury Conflicts with this Court's Definition of Redressability.

The lower court held that the District Court was unable to redress Petitioners' injury because a declaratory judgment alone "would not require the government to destroy the derivative materials in its possession." App. 71a. It added:

> Having bargained away all other forms of relief, Mayfield is now entitled only to a declaratory judgment. Although it is undisputed that the government retains materials derived from the FISA

> searches and surveillance of Mayfield's property, the only relief that would redress this alleged Fourth Amendment violation is an injunction requiring the government to return or destroy such materials.

App. 73a.[10]

Contrary to the Ninth Circuit's view, this Court has not required a plaintiff seeking a declaratory judgment to show that the declaration would guarantee redress. In *Larson*, 456 U.S. 228, this Court specifically rejected the contention that "in order to establish redressability, appellees must show that they are *certain*" to obtain relief as a result of a constitutional declaration. "We decline to impose that burden upon litigants." *Id.* at 243 n.15 (emphasis in original).

The threshold established by this Court is whether it is "likely," as opposed to merely "speculative," that the injury will be redressed by a favorable decision. *Lujan*, 504 U.S. at 560-61; *Laidlaw*, 528 U.S. at 181; *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982); *Simon*, 426 U.S. at 38.

Applying that standard, this Court has found that plaintiffs establish redressability by showing that a favorable decision would result in a "significant increase in the likelihood that the plaintiff would obtain relief." *Utah v. Evans*, 536 U.S.

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[10] The government has otherwise agreed that it will abide by the terms of a declaratory judgment. App. 79a.

452, 464 (2002). For example, in *Federal Election Commission v. Akins*, 524 U.S. 11, 24-25 (1998), voters had standing to seek a declaration that AIPAC is a "political committee" under the Federal Election Campaign Act, making it more likely that the FEC would require disclosures, even though the FEC could exercise its prosecutorial discretion and refuse to provide such redress, based on other grounds. *See also Larson*, 456 U.S. at 242 (religious organization challenging a requirement that it register and report charitable solicitations showed sufficient likelihood of redress, even though "[t]he Church may indeed be compelled, ultimately, to register under the Act on [another] ground."); *Village of Arlington Heights v. Metro. Housing Dev.*, 429 U.S. 252, 261 (1977) (developer seeking to purchase land to build racially integrated housing had standing to challenge defendant's refusal to rezone the property as racially discriminatory, even though the relief sought "would not, of course, guarantee" the project would be built.).

Other courts of appeals have correctly applied this Court's standard. *See, e.g., Toll Bros., Inc. v. Twp. of Readington*, 555 F.3d 131, 143 (3d Cir. 2009) ("Redressability is not a demand for mathematical certainty."); *Alabama-Tombigbee Rivers Coal. v. Norton*, 338 F.3d 1244, 1256 (11th Cir. 2003) (redressability "need only be 'likely,' not certain."); *Ne. Energy Assocs. v. FERC*, 158 F.3d 150, 154 (D.C. Cir. 1998) (the "possibility" that upon reconsideration agency might modify its rate orders "though not a certainty, is sufficient to meet the redressability requirement."); *Huntington Branch, NAACP v. Town of Huntington*, 689 F.2d 391, 394 (2d Cir. 1982) (plaintiff made sufficient showing that

invalidation of challenged ordinance "would tangibly improve the chances of construction"; redressability "is not a demand for complete certainty"). The Ninth Circuit itself has held: "Plaintiffs need not demonstrate that there is a 'guarantee' that their injuries will be redressed by a favorable decision" nor "that a favorable decision will inevitably redress" their injuries. *Wilbur v. Locke*, 423 F.3d 1101, 1108 (9th Cir. 2005) (quoting *Graham v. Fed. Emergency Mgmt. Agency*, 149 F.3d 997, 1003 (9th Cir. 1998)); *see also Bates v. UPS, Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc) (similar).

It is clear from this Court's precedents that Mayfield has met this likely-to-redress standard, despite the absence of injunctive relief. In *Franklin v. Massachusetts*, 505 U.S. 788 (1992), the Court held that the Commonwealth and two registered voters had standing to challenge a statistical methodology used in the 1990 census which affected the apportionment of representatives. Four justices concluded that, even without injunctive relief against the President or members of Congress who could change the reapportionment, "the injury alleged is likely to be redressed by declaratory relief . . . alone." *Id.* at 803 (plurality opinion). "[W]e may assume it is substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation of the census statute and constitutional provision by the District Court, even though they would not be directly bound by such a determination." *Id. Utah v. Evans*, 536 U.S. 452, 459 (2002), addressed a similar challenge seeking to change the statistical methodology employed in the 2000 census. This Court reaffirmed *Franklin* and adopted Justice O'Connor's

redressability discussion (quoted above) as controlling. *Id.* at 460-61. As one district court recently observed:

> *Franklin v. Massachusetts* demonstrates that suits for declaratory relief against government officials are appropriate even where other relief is not available, because it can be presumed that those officials will behave in compliance with a court's interpretation of a statute—even where injunctive relief is not available.

Ringo v. Lombardi, No. 09-4095-CV-C-NKL, 2010 WL 750055, at *3 (W.D. Mo. Mar. 2, 2010).[11]

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[11] The lower court's erroneous redressability ruling was based in large part on the notion that "any prospective benefits [to Mayfield] depend on an independent actor." App. 73a. This Court enunciated the "independent actor" rule in *Lujan*, 504 U.S. 555, to determine standing "*when the plaintiff is not himself the object of the government action* or inaction he challenges." *Id.* at 562.

> [Where redress] depends on the unfettered choices made by *independent actors not before the courts* and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict . . . the burden of the plaintiff [is greater].

Id. (emphasis added). In this case, Mayfield *was* the target of the government's action, and the government *was* before the court. The independent actor rule does not defeat redressability in this case.

C. The Ruling Below Defeats the Congressional Purpose of Allowing District Courts to Render a Declaratory Judgment as a Preferable Alternative to Direct Orders to State or Federal Governmental Entities.

1. The ruling below defeats the congressional purpose of authorizing district courts to render a declaratory judgment "whether or not further relief is or could be sought."

The Court of Appeals conceded that the district judge had the authority to issue an injunction against the government, though she chose not to do so.

> Finally, the district court did not—in conjunction with its Opinion and Order *sua sponte* order the government to return or destroy the derivative materials, but merely stated that "it is reasonable to assume that the Executive branch of the government will act lawfully and make all reasonable efforts to destroy the derivative materials when a final declaration of the unconstitutionality of the challenged provisions is issued.

App. 74a.

The District Court's measured response is precisely what Congress intended when it gave federal courts the authority to "declare the rights and other legal relations of any interested party seeking such a declaration, *whether or not further relief is or could be sought*." 28 U.S.C. § 2201 (emphasis added).

As this Court explained in *Steffel v. Thompson*, 415 U.S. 452 (1974), the Declaratory Judgment Act was intended to resolve a "storm of controversy" over the power of federal judges to enjoin a state's enforcement of its own statutes. *Id.* at 465. This Court in *Nashville, Chattanooga & St. Louis Railway v. Wallace*, 288 U.S. 249 (1933), made clear that "prayer for relief by injunction is not a necessary prerequisite" to review a state court declaratory judgment as an Article III case or controversy. *Id.* at 264. The Court pointed to the many "familiar examples of judicial proceedings which result in an adjudication of the rights of litigants, although execution is not necessary to carry the judgment into effect, in the sense that no damages are required to be paid or acts to be performed by the parties." *Id.* at 263. The following year, Congress enacted the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, explicitly rejecting the necessity of coercive injunctive relief. This Court in *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227 (1937), reaffirmed that such declaratory judgments can satisfy the case or controversy requirement. *Id.* at 244.

It was clear to this Court that "Congress plainly intended declaratory relief to act as an alternative to the strong medicine of the injunction . . . in cases where injunctive relief would

be unavailable," *Steffel*, 415 U.S. at 466, or "in circumstances where an injunction would not be appropriate.'" *Id.* at 467 (quoting *Perez v. Ledesma*, 401 U.S. 82, 111-12 (1971) (Brennan, J., dissenting in part)); *see, e.g., Zwickler v. Koota*, 389 U.S. 241, 254 (1967) (plaintiff may seek a declaratory judgment that a state statute is facially unconstitutional, even if injunctive relief is unavailable).

This Court has characterized the Declaratory Judgment Act as "an enabling Act, which confers a discretion on the courts" to issue declaratory relief in a manner "informed by the teachings and experience concerning the functions and extent of federal judicial power." *Wilton v. Seven Falls Co.*, 515 U.S. 277, 287 (1995). This flexibility was designed to uphold a party's federal rights under circumstances where "an injunction might be withheld because, despite a plaintiff's strong claim for relief under the established standards, the injunctive remedy seemed particularly intrusive or offensive; in such a situation, a declaratory judgment might be appropriate." *Samuels v. Mackell*, 401 U.S. 66, 73 (1971). In fact, this Court has instructed:

> At the conclusion of a successful federal challenge to a state statute or local ordinance, a district court can generally protect the interests of a federal plaintiff by entering a declaratory judgment, and therefore the stronger injunctive medicine will be unnecessary.

Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975); *see also* Fed. R. Civ. P. 57, Advisory Comm. Note ("[W]hen coercive relief only is sought but is deemed

ungrantable or inappropriate, the court may sua sponte, if it serves a useful purpose, grant instead a declaration of rights.").

District courts, like the District Court in this case, have long employed this feature of the Declaratory Judgment Act to uphold federal rights by enlisting the cooperation of state and local officials. *See, e.g., Philadelphia Newspapers, Inc. v. Borough Council of Swarthmore*, 381 F. Supp. 228, 245 (E.D. Pa. 1974) ("We decline, however, to grant the requested injunctive relief. . . . We have every reason to believe that they will accept this Court's final determination as to the constitutionality of the ordinance as applied, and that they will abide by the terms of the declaratory judgment herein entered."); *Rodos v. Michaelson*, 396 F. Supp. 768 (D.R.I. 1975) (concluding that injunction would not issue in connection with declaration that Rhode Island abortion law was unconstitutional because it was assumed that state officials would abide by the decision even in the absence of an injunction); *see also Strasser v. Doorley*, 432 F.2d 567, 570 (1st Cir. 1970) ("[V]indication of plaintiffs' rights does not require making defendants the subject of a federal injunction at this time. There is no reason to think that they will not accept in good faith a final determination of the ordinance's constitutionality.").

Consequently, district courts have also employed the flexibility Congress provided in the Declaratory Judgment Act to defend constitutional principles without resort to confrontational or intrusive commands directed against federal officials. For example, the court in *Tennessee v. Herrington*, 626 F. Supp. 1345 (M.D. Tenn. 1986),

declared certain actions by the Department of Energy illegal, but added:

> While this Court undoubtedly has the power to grant injunctive relief against the defendant, such relief does not appear to be necessary at this time. Absent proof or allegation that the Secretary will not abide by the declaratory judgment, the Court may assume that the defendant will proceed in good faith, and in a manner which is consistent with the declaratory judgment without the coercion of an injunction.

Id. at 1361; *see also Campaign Clean Water, Inc. v. Ruckelshaus*, 361 F. Supp. 689 (E.D. Va. 1973) (though EPA's impoundment of funds appropriated under the Water Pollution Control Act was declared to be null and void, an injunction would be inappropriate since there was no reason to conclude that the Administrator would not make a good-faith effort to proceed in accordance with the court's declaration); *cf. Forest Guardians v. Johanns*, 450 F.3d 455, 462 (9th Cir. 2006) (concluding that "[d]eclaratory judgment in favor of Forest Guardians would thus ensure that the Forest Service does not continue to fail to meet its monitoring responsibilities in the future and that it fulfills its duty under the [Endangered Species Act]" even though plaintiff's request for an injunction had been rendered moot).

If the Ninth Circuit's decision stands, plaintiffs who are aggrieved by governmental acts will be obliged to insist that a declaration of their

rights be accompanied by a coercive injunction. Where the district court does not issue such an order in the first instance, defendants will urge on appeal that the plaintiff's cause of action should be dismissed for want of standing. Such a result contravenes the statutory text authorizing a declaration of rights "whether or not further relief is or could be sought." 28 U.S.C. § 2201. As this Court has stated,

> [E]ngrafting upon the Declaratory Judgment Act a requirement that all of the traditional equitable prerequisites to the issuance of an injunction be satisfied . . . would defy Congress' intent to make declaratory relief available in cases where an injunction would be inappropriate.

Steffel, 415 U.S. at 471.

2. The ruling below defeats the congressional purpose of authorizing district courts to grant further injunctive relief if necessary or proper.

The Court of Appeals also found Petitioners' injury not redressable based on "the absence of any authority on which the district court could rely to insist *sua sponte* that the derivative materials be returned or destroyed." App. 74a.

This ruling ignores the congressional grant of authority in the Declaratory Judgment Act, which provides:

> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

28 U.S.C.A. § 2202.

Congress here enacted a statutory exception to the general rule that "[t]he filing of a notice of appeal . . . divests the district court of its control over those aspects of the case involved in the appeal," *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). The purpose of this provison "is to allow the district court to retain jurisdiction in order to grant the relief necessary to effectuate its prior judgment." *Burford Equip. Co., Inc. v. Centennial Ins. Co.*, 857 F. Supp. 1499, 1502 (M.D. Ala. 1994). Such relief includes injunctive relief. *Samuels*, 401 U.S. at 72.

As one authoritative treatise explains, this provision

> [i]s broad enough to permit the court to grant additional relief long after the declaratory judgment has been entered, provided that the party seeking relief is not barred by laches. The declaratory judgment does not merge a claim in the judgment or bar it. Accordingly, the rule permits the original judgment to be supplemented . . . by equitable relief even though coercive relief might have been available at the time of the declaratory action. It authorizes the court to grant relief that was not

> demanded or relief that was not even proved in the original declaratory-judgment action.

10 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure*, § 2771 at 865-67; *see also Heartland By-Products, Inc. v. United States*, 568 F.3d 1360, 1367-89 (Fed. Cir. 2009) ("[T]he appropriate remedy for the failure to comply with a declaratory judgment" is relief under 28 U.S.C. § 2202 "in the form of an injunction.")

Thus the issuance of a declaratory judgment in Mayfield's favor cannot be viewed as a gesture of no consequence. Rather, it makes it more likely that he will obtain redress because, "under 28 U.S.C. § 2202 a declaratory judgment might serve as the basis for issuance of a later injunction to give effect to the declaratory judgment." *Steffel*, 415 U.S. at 461 n.11; *see also Powell*, 395 U.S. at 499 ("A declaratory judgment can then be used as a predicate to further relief, including an injunction.").

The fact that Petitioners have agreed not to seek such relief does not negate the district court's power to enter such an order. *Starter Corp. v. Converse, Inc.*, 170 F.3d 286, 298-99 (2d Cir. 1999) (upholding the district court's authority under § 2202 to issue an injunction *sua sponte* even if not requested). It is the court's power, not the Mayfields', that is determinative. *See Franklin*, 505 U.S. at 825 ("Redressability requires that the court be able to afford relief *through the exercise of its power*.") (Scalia, J., concurring in part and concurring in the judgment) (emphasis in original).

The authority to administer this stronger medicine, if necessary, is an essential element of Congress's design for the federal district courts under the Declaratory Judgment Act. For example, in *Miske v. Spicola*, 314 F. Supp. 962 (M.D. Fla. 1969), after determining that seizures of publications belonging to plaintiff were constitutionally invalid, the court stated:

> This holding requires the return of the seized materials. This Court has no reason to question that the defendant law enforcement officers and prosecuting attorneys will, in good faith, abide by the rulings herein as to future seizures. By so doing, it will be unnecessary to issue any injunctions. However, this Court retains jurisdiction for the purpose of hereafter entering any orders necessary to enforce the holdings of this Court.

Id. at 964.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

June 22, 2010 Respectfully submitted,

Andre M. Mura*
Robert S. Peck
Jeffrey R. White
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
777 Sixth Street, N.W., Suite 520

Washington, DC 20001
(202) 944-2860

Elden M. Rosenthal
ROSENTHAL & GREEN, P.C.
121 S.W. Salmon Street
Suite 1090
Portland, OR 97204
(503) 228-3015

Gerry Spence
THE SPENCE LAW FIRM, LLC
15 South Jackson Street
P.O. Box 548
Jackson, WY 83001
(800) 967-2117

Michele Longo Eder
MICHELE LONGO EDER, LLC
4 S.W. High Street
P.O. Box 1530
Newport, OR 97365
(541) 265-3337

Counsel for Petitioners

*Counsel of Record

APPENDIX

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APPENDIX A:

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON (SEPT. 26, 2009)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BRANDON MAYFIELD, an individual, MONA MAYFIELD, an individual, and SHANE MAYFIELD, SHARIA MAYFIELD, and SAMIR MAYFIELD, individuals, by and through their guardian ad litem Mona Mayfield,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

Civil No. 04-1427-AA

OPINION AND ORDER

Gerry Spence
The Spence Law Firm, LLC
15 South Jackson Street, P.O. Box 548
Jackson, Wyoming 83001

Elden M. Rosenthal
Rosenthal & Greene, P.C.
1001 S.W. Fifth Avenue, Suite 1907
Portland, Oregon 97204

Michele Longo Eder
Michele Longo Eder, LLC

4 S.W. High Street, P.O. Box 1530
Newport, Oregon 97365

Attorneys for Plaintiffs

Peter D. Keisler
Assistant Attorney General
Karin J. Immergut
United States Attorney
Jeffrey S. Bucholtz
Principal Deputy Assistant Attorney General
Elizabeth J. Shapiro
Assistant Director
Renee S. Orleans
Nicholas A. Oldham
Trial Attorneys
U.S. Department of Justice Federal Programs Branch, Civil Division 20 Massachusetts Avenue, N.W., P.O. Box 883 Washington, D.C. 20044

Attorneys for defendant United States of America

AIKEN, Judge:

Plaintiffs' Amended Complaint requests declaratory relief that the Foreign Intelligence Surveillance Act ("FISA"), as amended by the Patriot Act, is unconstitutional.

PROCEDURAL BACKGROUND

Plaintiffs filed this case on October 4, 2004, alleging various civil rights violations. Specifically, plaintiffs alleged a Bivens[1] claim for unlawful arrest

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[1] Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

and imprisonment and unlawful searches and seizures against four individual defendants. *See* Complaint, Claims 1-10, ¶¶ 1-74.

Plaintiffs also brought a claim under the Privacy Act, 5 U.S.C. § 552a, alleging the defendants began "leaking" information contained within the Department of Justice ("DOJ") and the Federal Bureau of Investigation ("FBI") files to the national and international media regarding plaintiff Brandon Mayfield ("Mayfield") and his arrest. *Id.*, Claim 11, ¶¶ 75-86.

Plaintiffs moved for injunctive and declaratory relief against defendants DOJ and the FBI FISA searches and surveillance. *See* Pub. L. No. 95-511, 92 Stat. 1790 (Oct. 25, 1978), 50 U.S.C. §§ 1801-1811. *Id.*, Claim 12, ¶¶ 87-90. Claim Twelve included plaintiffs' challenge to the constitutionality of portions of the "Patriot Act" (The United and Strengthening of America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001)). *Id.*, ¶ 89. Finally, plaintiffs brought a claim for the return of property improperly seized. *Id.*, Claim 13, ¶¶ 91-93.

Subsequently, motions were filed by both parties. The court heard oral argument on motions, and on July 28, 2005, issued an opinion, Mayfield *et al. v. Gonzales et al.*, 2005 WL 1801679 (D. Or. 2005) (doc. 83), ruling, in part, as follows: (1) defendant John T. Massey's motion to dismiss based on qualified immunity, or lack of personal jurisdiction, or in the alternative for summary judgment was denied; (2) defendants Werder's, Green's and Wieners' motion to dismiss or alternative motion for summary judgment based on qualified immunity, lack of personal jurisdiction, failure to state a claim

or alternatively, for summary judgment was denied; and (3) defendants DOJ's and FBI's motion to dismiss counts twelve and thirteen of the Complaint was denied.

On September 23, 2005, defendants filed an interlocutory appeal of this court's ruling with the Ninth Circuit Court of Appeals. However, on December 7, 2006, the Court of Appeals granted appellants' motion under Federal Rule of Appellate Procedure 42(b) f0r voluntary dismissal of their appeal. In November 2006, the parties informed this court they had reached a stipulated settlement regarding all issues except the one currently before this court. The court signed the stipulated settlement agreement on November 29, 2006.[2]

On December 6, 2006, plaintiffs filed an Amended Complaint for Declaratory Judgment. Pending before this court are the parties' cross-motions for summary judgment and defendant's motion to dismiss based on jurisdiction. The court held oral argument on September 10, 2007. The parties provided the court with written briefs, including supplemental briefs, in addition to comprehensive oral argument. Following careful consideration of all the arguments, plaintiffs'

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[2] The Settlement Agreement signed by this court limits plaintiffs' remaining claim to a facial (rather than as-applied) challenge to 50 U.S.C. §§ 1804 and 1823. Plaintiffs' claim is to be litigated based on the Amended Complaint, the parties' Recitation of Stipulated Facts, and memoranda of law. Moreover, the relief available to plaintiffs if they prevail is a declaratory judgment that one or both of these two provisions violates the Fourth Amendment. See Stipulation for Compromise Settlement and Release ("Settlement Agreement"), attached as Def's Ex. 1.

summary judgment motion is granted, and defendant's summary judgment motion and motion to dismiss are denied.

FACTUAL BACKGROUND[3]

In brief, the facts as alleged by plaintiffs are as follows: On March 11, 2004, in Madrid, Spain, terrorists' bombs exploded on commuter trains, murdering 191 persons, and injuring another 1600 persons, including three United States citizens. Shortly after the bombings, the Spanish National Police ("SNP") recovered fingerprints from a plastic bag containing explosive detonators. The bag was found in a Renault van located near the bombing site.

On March 13, 2004, the SNP submitted digital photographs of the latent fingerprints lifted from the plastic bag to Interpol Madrid, which then transmitted the digital photographs to the FBI in Quantico, Virginia. On that same day, the Latent Print Unit of the FBI initiated an Automated Fingerprint Identification System ("AFIS") search in an attempt to match the latent prints received from Spain with known prints in the FBI computer system. The FBI was unable to locate a fingerprint match.

On March 14, 2004, the FBI requested and received from Spain higher resolution digital photographs of the eight latent prints and on March 15, 2004, another AFIS search was performed. The FBI technicians programmed the computer to return

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[3] These facts are restated as set forth in the Opinion published by this court on July 28, 2005, cited above.

20 candidates whose known prints had features in common with what was identified as Latent Finger Print #17 ("LFP #17"). On March 15, 2004, the computer produced 20 candidates that met the criteria. Each candidate was identified by an AFIS "score," a number that reflected a rank as to how closely the AFIS computer determined each candidate's fingerprint matched certain features of LFP #17. Also included was an identification number for each candidate that allowed the FBI to retrieve the names, original fingerprint cards, and demographic information of each candidate on the list.

Demographic information included name, date of birth, sex, race, and social security number. This information allowed the FBI to perform background checks on each of the 20 candidates.

Mayfield's AFIS "score" ranked #4 on the list of 20 candidates. Mayfield is an American citizen born in Oregon and reared in Kansas. He lives with his wife and three children in Aloha, Oregon, a suburb of Portland. Mayfield is 38 years old, a former Army officer with an honorable discharge, and a practicing Oregon lawyer. Prior to his arrest, he had not traveled outside the United States since 1994, and he had never been arrested for a crime. Plaintiffs allege that FBI examiners were aware of Mayfield's Muslim faith and that this knowledge influenced their examination of Mayfield's fingerprints.

On March 17, 2004, a "Supervisory Fingerprint Specialist" for the FBI, Agent Green, concluded that Mayfield's left index fingerprint matched LFP #17. Plaintiffs allege that had Green properly performed the fingerprint identification analysis, he would have been compelled to declare

that Mayfield's print did not, in fact, match LFP #17. Plaintiffs allege that Green, however, was improperly influenced by Mayfield's adherence to the Muslim faith.

Green then submitted the print to Massey, an allegedly "independent fingerprint examiner," for verification. Massey is a former FBI employee, now retired, periodically hired by the FBI on a contract basis to "perform forensic examination of latent fingerprints." Plaintiffs allege that when Massey was employed by the FBI, he was reprimanded on at least three occasions for erroneously "identifying" fingerprints. Plaintiffs contend that Massey was selected to "verify" the identification because his "employment history of discipline for poor performance would strongly motivate him to agree and verify the prior identification." Plaintiffs believe that Massey was informed of Green's prior identification of LFP #17 to Mayfield, and that Mayfield was a practicing Muslim. Massey did, in fact, verify that Mayfield's left index fingerprint matched LFP #17.

The alleged "match" was then submitted to a senior FBI manager, Wieners, for verification. It is FBI policy that when there are less than 12 points of similarity between a latent print and a known print, a senior manager must review the alleged match. Plaintiffs allege that Wieners knew, prior to examining the print, that two examiners before him had identified and verified the purported match, and that Mayfield is Muslim. Wieners also verified that LFP #17 matched Mayfield's print.

On March 20, 2004, the FBI issued a formal report matching Mayfield's print to LFP #17. On March 21, 2004, FBI surveillance agents began to watch Mayfield and to follow Mayfield and members

of his family when they traveled to and from the Bilal Mosque, the family's place of worship; to and from Mayfield's law office, his place of employment; to and from the children's school; and to and from family activities.

Plaintiffs allege that at some point after the wrongful fingerprint identification, the FBI applied to the Foreign Intelligence Security Court ("FISC") for an order authorizing the FBI to place electronic listening devices ("bugs") in the "shared and intimate" rooms of the Mayfield family home; executed repeated "sneak and peek" searches of the Mayfield family home, occurring when the family was away from the home and performed "so incompetently that the FBI left traces of their searches behind, causing the Mayfield family to be frightened and believe that they had been burglarized;" obtained private and protected information about the Mayfields from third parties; executed "sneak and peek" searches of the law office of Brandon Mayfield; and placed wiretaps on Mayfield's office and home phones. The application for the FISA order before the FISC was personally approved by the U.S. Attorney General at the time, John Ashcroft.

On April 2, 2004, Mayfield's prints were sent by the FBI to Spain. Plaintiffs allege that by that date, the U.S. Government had already been advised by the Spanish Government that Moroccan immigrants were suspects in the Madrid bombing and had been taken into custody, and that the Spanish Government was not aware of any information connecting the Moroccans with Mayfield or anyone else in the United States.

The SNP examined the FBI's report and Mayfield's fingerprints, and concluded that there

were dissimilarities in the comparison of the two prints for which there was no explanation. On April 13, 2004, the SNP provided a written report to the FBI explaining that they had compared LFP #17 to Mayfield's fingerprints, and concluded there was no match.

On April 21, 2004, the FBI sent one or more agents to Madrid to meet with their Spanish counterparts. Spanish authorities who met with the FBI agents "refused to validate" the FBI's conclusion that LFP #17 and Mayfield's print were a match.

Plaintiffs allege that DOJ and FBI employees "concocted false and misleading affidavits" in order to justify even more intrusive searches and ultimately to justify Mayfield's arrest as a "material witness." An FBI investigator, Werder, submitted a "concocted affidavit" to a federal judge of this court, which stated that Green, Wieners, and Massey considered LFP #17 a "100% positive identification" of Mayfield. Although the affidavits stated that "preliminary findings" of the SNP "were not consistent" with the FBI fingerprint analysis, no mention was made of Spain's April 13, 2004, report to the FBI that stated the SNP did not agree with the FBI's fingerprint match of LFP #17 and Mayfield.

The affidavit included "speculative and prejudicial narratives" focusing on Mayfield's religion and association with co-practitioners. Plaintiffs cite as an example, Werders's inclusion in his affidavit the fact that Mayfield attended a mosque and advertised his legal services in "Jerusalem Enterprises," or what are known as the "Muslim Yellow Pages," as evidence connecting Mayfield to the bombings as a material witness. Plaintiffs respond that the "Muslim Yellow Pages"

also includes advertising by major companies such as Avis, Best Western and United Airlines. Plaintiffs allege that the affidavit submitted to this court was knowingly or recklessly false and misleading.

Due to Mayfield's protestations of innocence, and the issue of whether Mayfield's prints actually matched LFP #17, the Judge assigned to this matter ordered that LFP #17 be provided to a court-appointed expert witness for comparison to Mayfield's known fingerprints. That expert, Kenneth Moses, was selected by Mayfield and his defense attorneys. On May 19, 2004, Moses testified in the material witness proceeding that he had "compared the latent prints that were submitted on Brandon Mayfield, and [he] concluded that the latent print is the left index finger of Mr. Mayfield."

Based on these affidavits, broad search warrants were sought and issued. Mayfield's family home and law office were searched computer and paper files from his family home, including his children's homework, were seized. Mayfield was ultimately arrested and initially held in the lock down unit at the Multnomah County Detention Center. His family was not told where he was being held. He and his family were told, however, that he was being held as a primary suspect on offenses punishable by death, and that the FBI had made a 100% match of his fingerprint with the Madrid train bombing fingerprint. Plaintiffs allege that leaks to the media by the FBI and DOJ led to local, national, and international headlines that Brandon Mayfield's fingerprints linked him to the Madrid bombings.

Mayfield was ultimately arrested and imprisoned from May 6, 2004, through May 20, 2004. On May 19, 2004, the SNP advised the FBI, and on May 20, 2004, news reports revealed, that Spain had

matched the Madrid fingerprint with an Algerian, Ouhane Daoud.

Mayfield was released from prison the following day.[4]

STANDARDS

Motion to Dismiss

Under Fed. R. Civ. P. 12 (b) (6), once a claim has been stated adequately, it may be supported by "showing any set of facts consistent with the allegations in the complaint." *Bell Atlantic Corp. v. Twombly*, ___ U.S. ___, 127 S.Ct. 1955, 1960 (2007). *See also, Litchfield v. Spielberg*, 736 F.2d 1352, 1357 (9th Cir. 1984), cert. denied, 470 U.S. 1052 (1985). For the purpose of the motion to dismiss, the complaint is liberally construed in favor of the plaintiffs, and its allegations are taken as true. *Rosen v. Walters*, 719 F.2d 1422, 1424 (9th Cir. 1983).

Motion for Summary Judgment

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (c). Substantive law on an issue determines the materiality of a fact. *T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Assoc.*, 809 F.2d 626,

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[4] However, Mayfield was then held on home detention from May 21 through May 24, 2004.

630 Cir. 1987). Whether the evidence is such that a reasonable jury could return a verdict for the nonmoving party determines the authenticity of a dispute. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The moving party has the burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party shows the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings and identify facts which show a genuine issue for trial. *Id.* at 324.

Special rules of construction apply when evaluating summary judgment motions: (1) all reasonable doubts as to the existence of genuine issues of material fact should be resolved against the moving party; and (2) all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. *T.W. Electrical*, 809 F.2d at 630.

DISCUSSION

Plaintiffs' Amended Complaint challenges the lawfulness of the physical searches, electronic eavesdropping and wiretapping performed pursuant to authorization from the FISC Court in Washington D.C., and the lawfulness of the government's continued retention of materials derived from those searches, eavesdropping, and wiretapping. Plaintiffs allege that 50 U.S.C. § 1804 (electronic surveillance under FISA) and 50 U.S.C. § 1823 (physical searches under FISA) violate the Fourth Amendment[5] on their

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[5] The Fourth Amendment states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause,

face. Specifically, plaintiffs allege that pursuant to FISA and in violation of the Fourth Amendment, they were subjected to secret surveillance and searches of their home, law office, vehicles, and communications.

Plaintiffs allege their private information gathered pursuant to those searches has been disseminated to at least eight agencies of the federal government, including the Central Intelligence Agency, the National Security Council, the Department of Defense, the Department of Homeland Security, the DOJ, the FBI, the Department of the Treasury, and the National Security Agency.

Plaintiffs challenge the Patriot Act amendments to FISA that allow federal agents to circumvent Fourth Amendment probable cause requirements when investigating persons suspected of crimes. Amended Complaint, ¶¶ 23-24. Plaintiffs seek a declaratory judgment that 50 U.S.C. §§ 1804 and 1823, as amended by the Patriot Act, violate the Fourth Amendment of the United States Constitution. Id. ¶ 25. Finally, plaintiffs seek their costs and disbursements necessarily incurred in this lawsuit.

Background on FISA and the Patriot Act

FISA was enacted in 1978 to "provide a procedure under which the Attorney General can obtain a judicial warrant authorizing the use of electronic surveillance in the United States for foreign intelligence purposes." S. Rep. No. 95-604, 95th Cong. 2d Sess. 5, reprinted at 1978 U.S.C.C.A.N.

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supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV.

3906. In 1994, FISA was amended to permit applications for orders authorizing physical searches as well as electronic surveillance. 50 U.S.C. §§ 1821-1829.

FISA established two special courts: the FISC, which is comprised of eleven district court judges appointed by the Chief Justice of the United States Supreme Court, and the FISC of Review, which is comprised of three district court or court of appeals judges also appointed by the Chief Justice. 50 U.S.C. § 1803 (a), (b). The FISC has jurisdiction to grant or deny applications for orders authorizing electronic surveillance and physical searches under the procedures specified in FISA, and the FISC of Review has jurisdiction to review the denial of any application made under FISA. 50 U.S.C. § 1822(b)-(d).

FISA also allows the Attorney General to authorize the execution of an emergency search or surveillance so long as it is approved by the FISC within 72 hours. 50 U.S.C. § 1824(e)(1)(A) Applications for court orders authorizing searches or surveillance under FISA are made to the FISC under oath by a federal officer with the approval of the Attorney General. 50 U.S.C. §§ 1801(g), 1804, 1823. The application must identify or describe the target of the search or surveillance, and establish that the target is either a "foreign power" or an "agent of a foreign power." 50 U.S.C. §§ 1804(a)(3), 1804(a)(4)(A), 1823(a)(3), 1823(a)(4)(A). F1SA defines "foreign power" to include a "group engaged in international terrorism." 50 U.S.C. §§ 1801(a)(1), (4). The definition of an "agent of a foreign power" includes any person who "knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power[,]" or any person who "knowingly engages in sabotage or international

terrorism, or activities that are in preparation therefor, for or on behalf of a foreign power." 50 U.S.C. §§ 1801(b)(2)(A), (c). Where a "United States person"—a citizen or a permanent resident alien -is involved, the definition of an "agent of a foreign power" requires, in most instances, a showing of criminal activity. 50 U.S.C. §§ 1801(b)(2), (I).

In October 2001, Congress amended FISA to change the language found in § 1804(a)(7)(B) from "the purpose" of the search or surveillance is to obtain foreign intelligence information to "a significant purpose" of the search or surveillance is to obtain foreign intelligence information. Congress's intent in amending § 1804(a)(7)(B) was to break down barriers between criminal law enforcement and intelligence gathering. "Federal officers who conduct electronic surveillance to acquire foreign intelligence information may consult with Federal law enforcement officers to coordinate efforts to investigate or protect against" attack or other grave hostile acts, sabotage or international terrorism, or clandestine intelligence activities by foreign powers or by an agent of a foreign power. 50 U.S.C.. § 1806(k)(1)(A)-(C). The Act further provides that coordination "shall not preclude" the government's certification that a significant purpose of the surveillance is to obtain foreign intelligence information, or the issuance of an order authorizing the surveillance. *Id.* § 1806(k)(2).

Each FISA application must include a certification from a high-ranking Executive Branch official, such as the Director of the FBI, that the official "deems the information sought [by the search or surveillance] to be foreign intelligence information," and that "a significant purpose" of the search or surveillance is to obtain "foreign intelligence information." 50 U.S.C. §§ 1804(a)(7)(A)-

(B), 1823 (a)(7)(A)-(B). FISA defines "foreign intelligence information" to include information that "relates to, and if concerning a United States person is necessary to" protect the United States from espionage and international terrorism, an actual or potential attack, or the national defense or security of the United States generally. 50 U.S.C. §§ 1801(e)(1), (2).

An individual judge of the FISC reviews each FISA application following its submission. 50 U.S.C. §§ 1805, 1824. To approve an application, the judge must find that it establishes "probable cause" to believe that the target of the search or surveillance is a foreign power or an agent of a foreign power. Where the target of the search or surveillance is a U.S. citizen the judge must also find that the Executive Branch's certification that a significant purpose of the search or surveillance is to obtain foreign intelligence information is not "clearly erroneous." 50 U.S.C. §§ 1805(a)(5), 1824(a)(5); H.R. Rep. No. 95-1283, Part I, 95th Cong. 2d Sess. (1978), at 8081.

Plaintiffs' Allegations

Plaintiffs request a declaration from this court that FISA, as amended by the Patriot Act, violates the Fourth Amendment because it:

a. permit[s] the federal government to perform covert physical searches and electronic surveillance and wiretaps of the home, office and vehicles of a person without first requiring the government to demonstrate to a court the existence of probable cause that the person has committed a crime;

b. permit[s] the federal government to perform covert physical searches and electronic surveillance and wiretaps of a person without first requiring the government to demonstrate to a court that the primary purpose of the searches and surveillance is to obtain foreign intelligence information; and

c. permit[s] the federal government to covertly collect, disseminate and retain information collected through covert physical searches and electronic surveillance without first requiring the government to demonstrate to a court the existence of probable cause that the person who is the target of physical searches and electronic surveillance has committed a crime, or, alternatively, that the primary purpose of the searches and surveillance [is] to obtain foreign intelligence information. *Id.* at ¶ 25 a-c.

Prior to the Patriot Act, the government was required to certify that the primary purpose of its surveillance was to obtain foreign intelligence information. The Patriot Act now authorizes FISA surveillance and searches as long as a significant purpose of the surveillance and searches is the gathering of foreign intelligence. 50 U.S.C. §§ 1804 (a)(7)(B) and 1823(a)(7)(B). This amendment allows the government to obtain surveillance orders under FISA even if the government's primary purpose is to gather evidence of domestic criminal activity. *See In re All Matters Submitted To The Foreign Intelligence Surveillance Court* ("*In re FISC*"), 218 F.Supp.2d 611, 615 n.2 (FISC 2002). The practical result of this amendment, objected to by plaintiffs, is that in criminal investigations, the government can now avoid the Fourth Amendment's probable cause requirement when conducting surveillance or searches of a criminal suspect's home or office merely

by asserting a desire to also gather foreign intelligence information from the person whom the government intends to criminally prosecute. The government is now authorized to conduct physical searches and electronic surveillance upon criminal suspects without first proving to an objective and neutral magistrate that probable cause exists to believe that a crime has been committed. The government need only represent that the targeted individual was an agent of a foreign power (a representation that must be accepted unless "clearly erroneous") and that "a significant purpose" of the surveillance and search is to collect foreign intelligence.

Here, the government chose to go to the FISC, despite the following evidence: Mayfield did not have a current passport; he had not been out of the country since completing his military duty as a U.S. Army lieutenant in Germany during the early 1990s; the fingerprint identification had been determined to be "negative" by the SNP; the SNP believed the bombings were conducted by persons from northern Africa; and there was no evidence linking Mayfield with Spain or North Africa. The government nevertheless made the requisite showing to the FISC that Mayfield was an "agent of a foreign power." That representation, which by law the FISC could not ignore unless clearly erroneous, provided the government with sufficient justification to compel the FISC to authorize covert searches and electronic surveillance in support of a criminal investigation.

(1) Defendant's Motion to Dismiss Plaintiffs' Amended Complaint

A. STANDING

The defendant argues that this court lacks jurisdiction over plaintiffs' facial constitutional challenge because plaintiffs lack standing to seek declaratory relief against 50 U.S.C. §§ 1804 and 1823. "Article III of the Constitution confines the federal courts to adjudicating actual 'cases' and 'controversies.'" *Allen v. Wright*, 468 U.S. 737, 750 (1984). To show standing, plaintiffs must satisfy three elements: (1) an injury-in-fact which is concrete and particularized, and actual or imminent; (2) a casual connection between the injury and the government's conduct; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal quotation marks and citations omitted).

The defendant asserts that plaintiffs must show the FISA provisions are causing them an ongoing injury-in-fact or are likely to injure them in the future. Plaintiffs allege they "fear future uses of FISA, as amended by the Patriot Act." Amended Complaint, ¶ 25. Second, plaintiffs allege they "fear the future uses of the derivative materials in government files." *Id.* Finally, plaintiffs allege the government's mere possession of derivative FISA materials injures them. *Id.*

Specifically, plaintiffs allege that prior to the commencement of this lawsuit, Mayfield, through his court appointed public defenders, demanded that then Attorney General John Ashcroft detail the FISA searches and surveillance performed and purge all government files of the information collected. Ashcroft refused to do so, and plaintiffs allege that several federal agencies continue to retain information collected during the allegedly illegal and unconstitutional searches and surveillance. Amended Complaint, ¶ 25.

It is uncontested that plaintiffs have settled all claims for any past injuries, and as a matter of law past injuries do not support standing to seek prospective relief such as a declaratory judgment of facial unconstitutionality. In addition, the defendant asserts that plaintiffs cannot show that their alleged fear of future use of derivative FISA materials would be redressed by the only relief they can obtain a declaratory judgment that 50 U.S.C. §§ 1804 and 1823 violate the Fourth Amendment on their face. The government contends that such a declaratory judgment would protect plaintiffs against future searches or surveillance targeting them under a struck-down provision, but it would not prohibit any and all use of materials already in the government's possession.

The court disagrees. Plaintiffs' claims allege an on-going 'case' or 'controversy' providing this court with jurisdiction to adjudicate plaintiffs' claims pursuant to Article III.

Specifically, plaintiffs establish standing with an on-going actual injury-in-fact which is concrete and particularized; that is, the government's continued retention of derivative FISA materials collected by covert surveillance and searches from Mayfield, his wife, and their children. "Derivative FISA materials" are defined as follows: "[A]ny materials, in whatever form or place, derived directly or indirectly from or related to the FISA take as defined herein[.]" Settlement Agreement, Def's Ex. 1. The government provides that derivative materials may include photocopies or photographs of documents from confidential client files in Mayfield's law office, summaries and excerpts from the computer hard drives from the Mayfield law office and plaintiffs' personal computers at home, analysis of plaintiffs' personal bank records and bank records

from Mayfield's law office, analysis of client lists, websites visited, family financial activity, summaries of confidential conversations between husband and wife, parents and children, and other private activities of a family's life within their home. These materials, in a derivative form, have been distributed to various government agencies. The continued retention by government agencies of this material constitutes a real and continuing injury-in-fact to plaintiffs.[6]

Moreover, the cases relied upon by the government to support its contention that plaintiffs lack standing are distinguishable. These cases focus on claims that a past injury might occur again. Plaintiffs do not rely on their past injury. Rather they continue to suffer a present, on-going injury due to the government's continued retention of derivative material from the FISA seizure.

The government next asserts that a declaratory judgment will fail to effectively "cure" any injury alleged by plaintiffs. If plaintiffs prevail on their Amended Complaint, and the court enters a declaratory judgment finding the challenged portions of the Patriot Act unconstitutional, it is reasonable to assume that the Executive Branch of the government will act lawfully and make all reasonable efforts to destroy the derivative materials when a final declaration of the unconstitutionality of the challenged provisions is issued. This is sufficient to confer standing in this case. *See, e.g., Larson v.*

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[6] The court received the government's late filing titled, "Notice of Supplemental Information." The court appreciates the distinction between plaintiffs' pending FOIA requests (the 14,754 pages) and the remaining derivative FISA materials.

Valente, 456 U.S. 228, 243 n.15 (1982) ("plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his every injury.") (emphasis in original).

B. RIPENESS

Next, the defendant argues that plaintiffs cannot establish that their claim is ripe. Ripeness is designed to "'prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract agreements.' [The Court's] role is neither to issue advisory opinions nor to declare rights in hypothetical cases." *Thomas v. Anchorage Equal Rights Comms.*, 220 F.3d 1134, 1138 Cir. 2000) (en banc) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967)). To satisfy "this jurisdictional prerequisite," the court must determine whether "plaintiffs face 'a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement.'" *Id.* (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)).

The defendant contends that plaintiffs' failure to establish a sufficient likelihood of future injury also renders their claim for declaratory relief unripe. The government argues it would be "purely hypothetical and speculative to imagine that plaintiffs ever would be targeted for future searches or surveillance under the challenged provisions or that plaintiffs would ever be harmed by any future use of derivative FISA materials." Defendant's Memo, p. 3.

It is notable that, "in many cases, ripeness coincides squarely with standing's injury in fact

prong." *Thomas*, 220 F.3d at 1138. In fact, when "measuring whether the litigant has asserted an injury that is real and concrete rather than speculative and hypothetical, the ripeness inquiry merges almost completely with standing." *Id.* at 1139 (internal quotation omitted). Here, we have neither a hypothetical case nor an abstract agreement. As discussed above, a declaratory judgment striking the challenged sections of FISA will require the Executive Branch to destroy or otherwise eliminate the derivative materials currently maintained in government files. I find plaintiffs have established an injury-in-fact, an injury that is continuing and redressable. Thus, plaintiffs' injury is neither hypothetical nor speculative, and therefore, this claim is ripe for determination by this court.

In conclusion, defendant's motion to dismiss plaintiffs' Amended Complaint based on this court lacking jurisdiction is denied.

(2) Parties' Cross-Motions for Summary Judgment

A. Standard for Facial Challenge to a Statute

The defendant relies on *United States v. Salerno*, 481 U.S. 739, 745 (1987), to argue that a successful facial challenge to a statute "must establish that no set of circumstances exists under which the Act would be valid." First, this standard is more flexible than defendant represents, and second, plaintiffs adequately allege a facial challenge to the statute regardless of the standard applied.

For example in *Planned Parenthood v. Casey*, the Court held that a statute restricting access to abortion could be facially challenged if it presented an "undue burden" upon a constitutional right. 505

U.S. 833, 876-77 (1992). Notably, after the Court decided Casey, Justice Stevens stated that he did "not believe the Court has ever actually applied such a strict standard [as the Salerno standard], even in Salerno itself." *Washington v. Glucksberg*, 521 U.S. 702, 739-40 (1997) (Steven, J., concurring in judgment). Additionally, in 1999, in a facial challenge to a gang loitering ordinance, Justices Stevens, Souter and Ginsberg labeled the Salerno standard "dictum" and stated that "[t]o the extent we have consistently articulated a clear standard for facial challenges, it is not the Salerno formulation, which has never been the decisive factor in any decision of this Court, including Salerno itself." *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999).

The Ninth Circuit, sitting en banc, determined the Casey standard to be the appropriate standard for a facial challenge to the Washington Natural Death Act. Compassion in *Dying v. State of Washington*, 79 F.3d 790,798 n.9 (9th Cir. 1995) ("[S]ince the claimed liberty issue in this case is in many respects similar to the liberty issue involved in Casey, we believe that the Salerno test would not in any event be the appropriate one for adjudicating a facial challenge to Washington's prohibition on assisted suicide."), *rev'd on other grounds, Washington v. Glucksberg*, 521 U.S. 702 (1997). *See also Planned Parenthood of Southern Arizona v. Lawall*, 180 F.3d 1022 (9th Cir. 1999) (application of Casey standard in abortion challenge) Subsequently, the Ninth Circuit held that while "Casey 'overruled Salerno in the context of facial challenge to abortion statutes,' [it would] not reject Salerno in other contexts until a majority of the Supreme Court clearly directs us to do so." *Myers, Inc. v. City and County of San Francisco*, 253 F.3d 461, 467 (9th Cir. 2001).

Because the standard for reviewing a facial challenge to a statute involving the violation of a fundamental civil liberty is in flux, the court will consider whether plaintiffs' facial challenge satisfies either standard. Under Casey, plaintiffs must allege that the challenged sections of FISA, as amended by the Patriot Act, place an "undue burden" on the fundamental rights secured by the Fourth Amendment. Under the Salerno standard, plaintiffs must show that no set of circumstances can make constitutional the challenged sections of FISA, as amended by the Patriot Act. Plaintiffs satisfy either standard.

B. Constitutionality of FISA, as amended by the Patriot Act

At issue here are two fundamental concerns: the safety of our nation and the constitutional rights of citizens. With the passage of the Patriot Act, these concerns are now placed in conflict. The court recognizes that a difficult balance must be struck in a manner that preserves the peace and security of our nation while at the same time preserving the constitutional rights and civil liberties of all Americans.[7]

Prior to passage of the Patriot Act, the government would have been required to follow the traditional process and demonstrate probable cause to a "detached and neutral magistrate" that Mayfield had committed a crime. Therefore, prior to issuing a search warrant, the Fourth Amendment required

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[7] *See Doe v. Gonzalez et al.*, CV 04-2614 (S.D.N.Y. Sept. 6, 2007) (sections of the Patriot Act, as amended, authorizing the issuance of "national security letters" held unconstitutional).

that law enforcement have reasonable grounds to believe that the law was being violated. FISA does not contain this criminal standard of probable cause. Instead, FISA contains a "foreign intelligence standard" of probable cause which requires a showing that the target may be an agent of a foreign government and the place or facility to be searched is being used in furtherance of espionage or terrorist activities.

Significantly, a seemingly minor change in wording has a dramatic and significant impact on the application of FISA. A warrant under FISA now issues if "a significant purpose" of the surveillance is foreign intelligence. Now, for the first time in our Nation's history, the government can conduct surveillance to gather evidence for use in a criminal case without a traditional warrant, as long as it presents a non-reviewable assertion that it also has a significant interest in the targeted person for foreign intelligence purposes.

Since the adoption of the Bill of Rights in 1791, the government has been prohibited from gathering evidence for use in a prosecution against an American citizen in a courtroom unless the government could prove the existence of probable cause that a crime has been committed. The hard won legislative compromise previously embodied in FISA reduced the probable cause requirement only for national security intelligence gathering. The Patriot Act effectively eliminates that compromise by allowing the Executive Branch to bypass the Fourth Amendment in gathering evidence for a criminal prosecution.

In 1967, the Supreme Court held that a New York statute authorizing electronic surveillance violated the Fourth Amendment because: (1) "it did

not requir[e] the belief that any particular offense has been or is being committed; nor that the 'property' sought, the conversations, be particularly described;" (2) it failed to limit the duration of the surveillance to impose sufficiently stringent requirements on renewals of the authorization; and (3) the statute "has no requirement for notice as do conventional warrants, nor does it overcome this defect by requiring some showing of special facts." *Berger v. New York*, 388 U.S. 41, 58-60 (1967).

The Court specifically rejected the state's argument that Fourth Amendment requirements should be relaxed because the surveillance statute was essential in its fight against organized crime. The Court held:

> [W]e cannot forgive the requirements of the Fourth Amendment in the name of law enforcement. This is no formality that we require today but a fundamental rule that has long been recognized as basic to the privacy of every home in America. While the requirements of the Fourth Amendment are not inflexible, or obtusely unyielding to the legitimate needs of law enforcement, it is not asking too much that officers be required to comply with the basic command of the Fourth Amendment before the innermost secrets of one's home or office are invaded. Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices.

Id. at 62-63 (internal quotation and citation omitted).

Subsequently, the Supreme Court in *Katz v. United States*, 389 U.S. 347 (1967), held that the Fourth Amendment's probable cause and warrant requirements apply to electronic surveillance. In a footnote, however, the majority opinion expressly deferred deciding whether the Fourth Amendment requires prior judicial authorization of surveillance in cases involving national security. *Id.* at 358 n.23. Four years later, the Supreme Court revisited the issue in *United States v. United States District Court*, 407 U.S. 297 (1972) (*Keith*). That case arose from the prosecution of three citizens who were allegedly conspiring to bomb a CIA office in Ann Arbor, Michigan. *Id.* at 299. While the Supreme Court recognized both the Executive Branch's interest in protecting national security and the value of electronic surveillance in detecting security threats, the Court nonetheless noted:

> There is understandably, a deep-seated uneasiness and apprehension that this [surveillance] capability will be used to intrude upon cherished privacy of law-abiding citizens. We look to the Bill of Rights to safeguard this privacy. Though physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed, its broader spirit now shields private speech from unreasonable surveillance.

Id. at 312-13(footnote omitted).

Ultimately, the Court rejected the Executive Branch's arguments that "internal security matters are too subtle and complex for judicial evaluation" and that "prior judicial approval will fracture the secrecy essential to official intelligence gathering." *Id.* at 320. Significantly, the Supreme Court

expressly rejected the Executive Branch's argument that exceptions to the Fourth Amendment warrant requirement should be recognized for domestic security surveillance and held that the decision to conduct electronic surveillance cannot be left to the discretion of law enforcement officials:

> These Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillance may be conducted solely within the discretion of the Executive Branch. The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate, and to prosecute. But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech.

Id. 316-17 (internal citation and footnote omitted).

Finally, the Supreme Court noted the differences between surveillance for criminal investigative purposes and surveillance for intelligence purposes. The Court noted the "potential distinctions between Title III criminal surveillance and those involving domestic security," and suggested that Congress "may wish to consider

protective standards for the latter which differ from those already prescribed for specified crimes in Title III." *Id.* at 322.

After the Supreme Court's decision in Keith, and prior to the enactment of FISA, numerous federal appellate courts recognized our Nation's interest in security and affirmed warrantless surveillance authorized within the Executive Branch, because the purpose of the surveillance was foreign intelligence gathering. *See, e.g., United States v. Brown*, 484 F.2d 418, 426 (5th Cir. 1973); *United States v. Butenko*, 494 F.2d 593 (3d Cir. 1974); *United States v. Buck*, 658 F.2d 871 (9th Cir. 1977). The Third, Fifth and Ninth Circuits all held that warrantless surveillance could be conducted by the Executive Branch only if the purpose of this surveillance was to gather foreign intelligence. *Brown*, 484 F.2d at 426; *Butenko*, 494 F.2d at 593; and *Buck*, 658 F.2d at 871. It was against this backdrop, in 1978, that Congress passed FISA, permitting the government to obtain an electronic surveillance order based upon probable cause that the prospective target was a "foreign power" or an "agent of a foreign power." Pub. L. No. 95-511, § 101, 92 Stat. 1783 (1978).

The decisions in *Katz* and *Keith* drew a line between surveillance conducted by law enforcement officials to investigate crime—which requires a traditional warrant based on probable cause -and surveillance conducted by intelligence officials to obtain foreign intelligence information. Notably, the primary purpose of the electronic surveillance and physical searching of Mayfield's home was to gather evidence to prosecute him for crimes. Mayfield was ultimately arrested to compel his testimony before a Grand Jury investigating his alleged involvement in the crimes of bombing places of public use, providing

national support to terrorists and conspiracy to kill, kidnap, maim or injure persons or damage property in a foreign county. *In Re: Federal Grand Jury 03-01 Matter of Material Witness*, No. 04-MC-9071 (D. Or. 2004). The government stipulated that it did not demonstrate to the FISC that its primary purpose in wiretapping, electronically eavesdropping, or physically searching Mayfield's home or law office was to gather foreign intelligence. "In the FISA applications, the government did not seek to establish, and under the terms of FISA was not required to establish, all of the requirements set forth in 18 U.S.C. § 2510 *et seq.* and Rule 41, Fed. R. Crim. P." Recitation of Stipulated Facts ("Stip."), ¶ a. Thus, FISA now permits the Executive Branch to conduct surveillance and searches of American citizens without satisfying the probable cause requirements of the Fourth Amendment.[8] As plaintiffs allege, when proceeding pursuant to FISA, "there is no [need for] showing or finding that a crime has been or is being committed, as in the case of a search or seizure for law enforcement purposes." Plaintiffs' Memo in Support of Summary Judgment, p. 26. "Additionally, and with respect to the nexus to criminality required by the definitions of an 'agent of a foreign power,' the government need not show probable cause as to each and every element of the crime involved or about to be involved." *Id.* When the

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[8] Members of Congress expressed reservations about the constitutionality of the "significant purpose" amendment to FISA in light of the "primary purpose" requirement rooted in the Fourth Amendment. 147 Congo Rec. S10593 (Oct. 11, 2001) (Sen. Leahy); *id.* at S10568 (Sen. Specter); id. at S10585 (Sen. Cantwell); *id.* at S10597 (Sen. Kennedy); *id.* at E1896 (Oct. 12, 2001) (Rep. Mink); *id.* at H6760 (Rep. Scott); *id.* at H6761 (Rep. Lofgren); *id.* at H6767 (Rep. Conyers); *id.* at H6772 (Rep. Udall).

FISC reviews a FISA search application, the government, satisfies most FISA requirements simply by certifying that the requirements are met. 50 U.S.C. § 1804 (a) (7). The statute directs that the FISC is not to scrutinize such statements, but is to defer to the government's certification unless it is "clearly erroneous." *Id.* at § 1805 (a) (5); § 1824 (a).

This procedure allows the government to avoid traditional Fourth Amendment judicial oversight used to obtain a surveillance order. The government must provide the court with "a full and complete statement of the facts and circumstances relied upon by the applicant to justify his belief that an order should be issued." 18 U.S.C. § 2518 (1) (b). The court may "require the applicant to furnish additional testimony or documentary evidence in support of the application." *Id.* at § 2518 (2). Finally, as to most substantive requirements, the court must find probable cause to believe they are satisfied. *Id.* at § 2518(3).

The FISA also allows the government to retain information collected, and use the collected information in criminal prosecutions without providing any meaningful opportunity for the target of the surveillance to challenge its legality. Nor does FISA require notice. The Fourth Amendment ordinarily requires that the subject of a search be notified that the search has occurred. Although in some circumstances the government is permitted to delay the provision of notice, the Supreme Court has never upheld a statute that, like FISA, authorizes the government to search a person's home or intercept his communications without ever informing the person that his or her privacy has been violated. Except for the investigations that result in criminal prosecutions, FISA targets never learn that their homes or offices have been searched or that their

communications have been intercepted. Therefore, most FISA targets have no way of challenging the legality of the surveillance or obtaining any remedy for violations of their constitutional rights.

FISA also does not require particularity. The Fourth Amendment prohibits the government from conducting intrusive surveillance unless it first obtains a warrant describing with particularity the things to be seized as well as the place to be searched. Berger, 388 U.S. at 58 (Fourth Amendment particularity requirement intended to prevent government's reliance on "general warrants" that allow "seizure of one thing under a warrant describing another"). The Supreme Court has underscored the importance of the particularity requirement:

> By its very nature eavesdropping involves an intrusion on privacy that is broad in scope. [T]he indiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth and Fifth Amendments, and imposes a heavier responsibility on this Court in its supervision of the fairness of procedures.

Id. at 56, 63 (internal quotation marks and citations omitted).

Finally, FISA authorizes surveillance terms up to 120-days. 50 U.S.C. § 1805(e) (1) (B) Title III limits the term of surveillance to 30 days. 18 U.S.C. § 2518 (5). The Ninth Circuit has held that in the context of criminal investigations, the 30 day limitation is constitutionally required. *United States v. Koyomejian*, 970 F.2d 536, 542 (9th Cir.), *cert.*

denied, 506 U.S. 1005 (1992). Given *Berger* and *Koyomejian*, FISA's provisions relating to the duration of surveillance orders violates the Fourth Amendment requirements for criminal investigations.

The government does not refute plaintiffs' historical recitation of law leading up to the enactment of FISA. Similarly, the parties agree that when surveying the case law prior to *In re Sealed Case*, 310 F.3d 717 (FISA Ct. of Rev. 2003), every Article III court that had considered the issue directly concluded that to justify non-probable cause searches and electronic surveillance, the government's purpose, or at least its primary purpose, must have been the collection of foreign intelligence. Specifically, as originally drafted and implemented over its 24-year history, FISA applications were properly granted only when "the purpose" of the surveillance was foreign intelligence gathering.

In the history underlying In re Sealed Case, the government sought to conduct surveillance of an "agent of a foreign power." In granting the request, the FISC also addressed the new 2002 FISA Procedures. On May 17, 2002, the seven judges of the FISC issued a rare public and unanimous opinion ruling the Procedures improper. The FISC court held:

> [The 2002 Procedures] are designed to enhance the acquisition, retention, and dissemination of evidence for law enforcement purposes, instead of being consistent with the need of the United States to 'obtain, produce, and disseminate foreign intelligence information[.] The 2002 Procedures

> appear to be designed to amend the law and substitute the FISA for Title III electronic surveillances and Rule 41 searches.

In re All Matters Submitted To The Foreign Intelligence Surveillance Court, 218 F.Supp.2d 611, 623 (FISC 2002) (*In re FISC*) (emphasis in original).

The government filed the first ever appeal to the FISCR, a court that had never before met. The FISCR reversed the FISC's ruling and held the 2002 Procedures consistent with the Patriot Act, found the 2002 Procedures constitutionally reasonable, and held that they met Fourth Amendment standards. While the court permitted amicus briefs, only the government was allowed to appear and participate at oral argument. Moreover, only the government is allowed under FISA to seek Supreme Court review of a FISCR decision, which it declined to do. Even without the benefit of full adversarial proceedings, the FISCR conceded that "the constitutional question presented by this case—whether Congress' disapproval of the primary purpose test is consistent with the Fourth Amendment—has no definitive jurisprudential answer." *In re Sealed Case*, 310 F.3d at 743.

The government cites In re Sealed Case as "highly persuasive" authority for this court and suggests that the Ninth Circuit would adopt the ruling.[9] The government cites both *United States v.*

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[9] The government recently provided the court with a copy of *United States v. Holy Land Found. for Relief and Dev.*, 2007 WL 2011319 (N.D. Tex. July 11, 2007), in which the court decided a motion to compel production of documents related to the government's applications under FISA and a motion to suppress evidence obtained from that surveillance. The court denied the motions rejecting defendants' Fourth Amendment

Cavanagh, 807 F.2d 787 (9th Cir. 1987), and *United States v. Sarkissian*, 841 F.2d 959 (9th Cir. 1988), as evidence that the Ninth Circuit would follow the ruling of In re Sealed Case. Both Ninth Circuit cases were decided prior to the Patriot Act's amendments to FISA. Regardless, I disagree with the government's analysis and find those cases are not persuasive as to whether the Ninth Circuit would adopt the reasoning of *In re Sealed Case*. For example, in *Cavanagh* the court held that where "the purpose of the surveillance is to obtain foreign intelligence," FISA passes constitutional muster. *Id.* at 790-91.

In *Sarkissian*, the Ninth Circuit expressly declined to consider whether the primary purpose test was constitutionally required. 871 F.2d at 964 ("We also decline to decide the issue. We have generally stated that the purpose of the surveillance must be to secure foreign intelligence information.").

In this case, the court declines to adopt the analysis and conclusion reached by the FISCR in *In re Sealed Case*. Notably, the FISCR's two fundamental premises underlying its ruling are contradictory. FISCR determined both that FISA never contained a purpose requirement, and that in altering the purpose requirement, Congress did not undermine the validity of searches conducted pursuant to FISA. Regarding FISCR's second premise, FISCR found that the primary purpose test

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challenge, and relied on the "thorough analy[sis]" by the FISCR in *In re Sealed Case*. I find this case simply reiterates the analysis of In re Sealed Case, and therefore does not aid in the resolution of this difficult issue.

"generates dangerous confusion and creates perverse organizational incentives arising from the purported need to distinguish between intelligence gathering and criminal investigation." *Id.* at 743. However, a provision of the Patriot Act, unchallenged by plaintiffs here, eliminates the DOJ "wall" and with it the "dangerous confusion" and "perverse organizational incentives" referred to and relied on by the FISCR. Moreover, to the extent the "primary purpose" test imposes any restraint on the sharing of FISA surveillance with criminal investigators, investigators are, of course, free to seek orders authorizing surveillance under Title III, and traditional search warrants that satisfy Fourth Amendment requirements. Finally, Title III includes predicate offenses for which surveillance is justified for virtually all terrorism and espionage-related offenses. 18 U.S.C. § 2516(1). As such, Title III provides a satisfactory alternative when criminal investigators cannot have access to FISA surveillance.

The FISCR also attempts, without merit, to distinguish the Supreme Court's "special needs" cases. *In re Sealed Case*, 310 F.3d at 745-46 n. 33. "Special needs" cases are those where the Supreme Court has found it appropriate to carve out an exception to the Fourth Amendment's requirement of probable cause based upon an individualized suspicion of wrongdoing. In these cases, the Court found that special needs, beyond the normal need of law enforcement, might justify an otherwise unconstitutional search. *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 619 (1989). Prior to the Patriot Act, FISA may have had as its "general programmatic purpose, to protect the nation against terrorism and espionage threats directed by foreign powers." *In re Sealed Case*, 310 F.3d at 46. After the Patriot Act, however, FISA surveillance, including

the surveillance at bar, may have as its "programmatic purpose" the generation of evidence for law enforcement purposes -which is forbidden without criminal probable cause and a warrant.

Finally and perhaps most significantly, In re Sealed Case ignores congressional concern with the appropriate balance between intelligence gathering and criminal law enforcement. It is notable that our Founding Fathers anticipated this very conflict as evidenced by the discussion in the Federalist Papers. Their concern regarding unrestrained government resulted in the separation of powers, checks and balances, and ultimately, the Bill of Rights. Where these important objectives merge, it is critical that we, as a democratic Nation, pay close attention to traditional Fourth Amendment principles. The Fourth Amendment has served this Nation well for 220 years, through many other perils. Title III, like the Supreme Court's pronouncements in Katz and Berger, recognizes that wiretaps are searches requiring fidelity to the Fourth Amendment.

Moreover, the constitutionally required interplay between Executive action, Judicial decision, and Congressional enactment, has been eliminated by the FISA amendments. Prior to the amendments, the three branches of government operated with thoughtful and deliberate checks and balances -a principle upon which our Nation was founded. These constitutional checks and balances effectively curtail overzealous executive, legislative, or judicial activity regardless of the catalyst for overzealousness. The Constitution contains bedrock principles that the framers believed essential. Those principles should not be easily altered by the expediencies of the moment.

Despite this, the FISCR holds that the Constitution need not control the conduct of criminal surveillance in the United States. In place of the Fourth Amendment, the people are expected to defer to the Executive Branch and its representation that it will authorize such surveillance only when appropriate.

The defendant here is asking this court to, in essence, amend the Bill of Rights, by giving it an interpretation that would deprive it of any real meaning. This court declines to do so. For over 200 years, this Nation has adhered to the rule of law—with unparalleled success. A shift to a Nation based on extra-constitutional authority is prohibited, as well as ill-advised. In this regard, the Supreme Court has cautioned: The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power. Nor must the fear of unauthorized official eavesdropping deter vigorous citizen dissent and discussion of Government action in private conversation. For private dissent, no less than open public discourse, is essential to our free society. *Keith*, 407 U.S. at 314.

Therefore, I conclude that 50 U.S.C. §§ 1804 and 1823, as amended by the Patriot Act, are unconstitutional because they violate the Fourth Amendment of the United States Constitution. Plaintiffs' Amended Complaint for declaratory relief is granted.

CONCLUSION

Based on the foregoing, plaintiffs' motion for summary judgment (doc. 126) is granted. Defendant's motion to dismiss the Amended Complaint (doc. 134) or cross-motion for summary judgment (doc. 134) is denied. The parties have until

November 1, 2007, to submit a stipulation regarding costs, or file briefs regarding this issue.

IT IS SO ORDERED.

Dated this 26 day of September, 2007.

/s/Ann Aiken
United States District Judge

APPENDIX B:

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (Dec. 10, 2009)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRANDON BIERI MAYFIELD, an individual; MONA MAYFIELD, appointed as Guardian Ad Litem per Order; SHANE MAYFIELD; SHARIA MAYFIELD; SAMIR MAYFIELD, individuals, by and through their guardian ad litem Mona Mayfield,

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA,

Defendant-Appellant.

No. 07-35865
D.C. No. CV-04-01427-AA

Appeal from the United States District Court
for the District of Oregon

Ann L. Aiken, Chief District Judge, Presiding

Argued and Submitted February 5, 2009
Portland, Oregon

Filed December 10, 2009

Before: Richard A. Paez and Johnnie B. Rawlinson,

Circuit Judges, and Raner C. Collins,* District Judge.

Opinion by Judge Paez

COUNSEL

Douglas Letter and Scott McIntosh, Civil Division, Department of Justice, Washington, D.C., for the appellant.

Elden Rosenthal, Rosenthal & Greene, P.C., Portland, Oregon, for the appellees.

OPINION

PAEZ, Circuit Judge:

In this appeal, we must decide whether Plaintiffs-Appellees Brandon Mayfield, a former suspect in the 2004 Madrid train bombings, and his family, have standing to seek declaratory relief against the United States that several provisions of the Foreign Intelligence Surveillance Act ("FISA") as amended by the PATRIOT Act are unconstitutional under the Fourth Amendment of the U.S. Constitution. Although Mayfield settled the bulk of his claims against the government, the settlement agreement allowed him to pursue his Fourth Amendment claim. According to the terms of the settlement agreement, the only relief available to Mayfield, if he were to prevail on his Fourth Amendment claim, is a declaratory judgment. He may not seek injunctive relief. We hold that, in light

* The Honorable Raner C. Collins, United States District Judge for the District of Arizona, sitting by designation.

of the limited remedy available to Mayfield, he does not have standing to pursue his Fourth Amendment claim because his injuries already have been substantially redressed by the settlement agreement, and a declaratory judgment would not likely impact him or his family. We thus vacate the judgment of the district court.

I.

On March 11, 2004, terrorists' bombs exploded on commuter trains in Madrid, Spain, killing 191 people and injuring another 1600 people, including three U.S. citizens.[1] Shortly after the bombings, the Spanish National Police ("SNP") recovered fingerprints from a plastic bag containing explosive detonators. The bag was found in a Renault van located near the bombing site. On March 13, 2004, the SNP submitted digital photographs of the fingerprints to Interpol Madrid, which then transmitted them to the FBI in Quantico, Virginia.

The FBI searched fingerprints in its own computer system, attempting to match the prints received from Spain. On March 15, 2004, an FBI computer produced 20 candidates whose known prints had features in common with what was identified as Latent Finger Print #17 ("LFP #17"). The FBI performed background checks on each of the candidates, one of whom was Brandon Mayfield.

Mayfield is a U.S. citizen, born in Oregon and brought up in Kansas. He lives with his wife and three children in Aloha, Oregon, a suburb of

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[1] The facts relevant to this appeal, as contained in the amended complaint, stipulated facts, and declarations in support of the cross-motions for summary judgment, are undisputed by the parties.

Portland. He is 43 years old, a former Army officer with an honorable discharge, and a practicing lawyer. Mayfield is also a Muslim with strong ties to the Muslim community in Portland.

On March 17, 2004, FBI Agent Green, a fingerprint specialist, concluded that Mayfield 's left index fingerprint matched LFP #17. Green then submitted the fingerprints for verification to Massey, a former FBI employee who continued to contract with the FBI to perform forensic analysis of fingerprints. Massey verified that Mayfield 's left index fingerprint matched LFP #17. The prints were then submitted to a senior FBI manager, Wieners, for additional verification. Wieners also verified the match.

On March 20, 2004, the FBI issued a formal report matching Mayfield 's print to LFP #17. The next day, FBI surveillance agents began to watch Mayfield and follow him and members of his family when they traveled to and from the mosque, Mayfield 's law office, the children 's schools, and other family activities. The FBI also applied to the Foreign Intelligence Security Court ("FISC") for authorization to place electronic listening devices in the "shared and intimate" rooms of the Mayfield family home; searched the home while nobody was there; obtained private and protected information about the Mayfields from third parties; searched Mayfield 's law offices; and placed wiretaps on his office and home phones. The application for the FISC order was personally approved by John Ashcroft, then the Attorney General of the United States.

In April 2004, the FBI sent Mayfield 's fingerprints to the Spanish government. The SNP examined the prints and the FBI 's report, and concluded that there were too many unexplained

dissimilarities between Mayfield 's prints and LFP #17 to verify the match. FBI agents then met with their Spanish counterparts in Madrid, who refuted the FBI 's conclusion that there was a match.

After the meeting with the SNP, the FBI submitted an affidavit to the district court, stating that experts considered LFP #17 a "100% positive identification" of Mayfield. The affidavit did not mention that the SNP had reached a different conclusion. The affidavit did include information about Mayfield 's religious practice and association with other Muslims. On May 4, 2004, the government named Brandon May-field as a material witness and filed an application for material witness order. The district court appointed an independent fingerprint expert, Kenneth Moses, to analyze the prints in question. Mayfield and his defense attorneys approved the appointment. Moses concluded that LFP #17 was from Mayfield 's left index finger.

The district court issued several search warrants, which resulted in the search of Mayfield 's home and office, and the seizure of his computer and paper files, including his children 's homework. On May 6, 2004, Mayfield was arrested and imprisoned for two weeks. His family was not told where he was being held, but was told that his fingerprints matched those of the Madrid train bomber, and that he was the prime suspect in a crime punishable by death. While Mayfield was detained, national and international headlines declared him to be linked to the Madrid bombings. On May 20, 2004, news reports revealed that Spain had matched LFP #17 with a man named Ouhane Daoud, an Algerian citizen. Mayfield was released from prison the following day.

On October 4, 2004, Mayfield, his wife, and his children[2] filed suit against the government in the United States District Court for the District of Oregon. The complaint alleged a Bivens[3] claim for unlawful arrest and imprisonment and unlawful searches, seizures, and surveillance in violation of the Fourth Amendment; a claim under the Privacy Act, 5 U.S.C. § 552a, for leaking information from the FBI and DOJ to media sources regarding Brandon Mayfield 's arrest; a claim for the return of property improperly seized; and a Fourth Amendment challenge to the constitutionality of several FISA provisions and the PATRIOT Act.

Mayfield reached a settlement agreement with the government, and the district court approved the agreement on November 29, 2006. The agreement provided that the government would pay compensatory damages of $2 million to Mayfield and his family; destroy documents relating to the electronic surveillance conducted pursuant to FISA; return all seized physical materials to Mayfield; and apologize to Mayfield and his family. In return, Mayfield agreed to release the government of all liability or further litigation, except as to one specific claim: that 50 U.S.C. §§ 1804 (authorizing electronic surveillance under FISA) and 1823 (authorizing physical searches under FISA) violate the Fourth Amendment of the U.S. Constitution. The parties agreed that the sole relief that Mayfield could seek or that the court could award with regard to this claim would be a declaratory judgment. The parties also signed a Recitation of Stipulated Facts, which would

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[2] Because the family 's claims are identical to Mayfield 's, we refer to all plaintiffs collectively as "Mayfield."

[3] *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

serve as the sole factual basis of any future litigation.

On December 6, 2006, Mayfield filed an Amended Complaint for Declaratory Judgment. The complaint challenged the constitutionality of 50 U.S.C. §§ 1804 and 1823, the portions of FISA, as amended by the PATRIOT Act,[4] that allow the government to conduct physical searches, electronic surveillance, and wiretaps of residences and offices without requiring proof of probable cause or an assertion that the primary purpose of such activities is to gather foreign intelligence information. The complaint asserted that the statutory provisions were facially unconstitutional. Mayfield claimed that he continued to suffer injury because the government refused to identify and destroy all materials derived from the FISA searches and seizures,[5] and that he

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[4] Prior to 2001, several federal courts construed FISA to authorize searches and electronic surveillance only when the government 's primary purpose was to collect foreign intelligence information. *See, e.g., In re Sealed Case*, 310 F.3d 717 (FISCR 2002) (discussing pre-2001 cases). Following the September 11, 2001 terrorist attacks, Congress enacted the PATRIOT Act, which changed the judicially-accepted standard of "primary purpose" to "significant purpose." Pub. L. No. 107-56, § 218, 115 Stat. 291 (2001) (amending 50 U.S.C. §§ 1804(a)(6)(B) and 1823(a)(6)(B)). Under the "significant purpose" standard, the government may conduct FISA searches and surveillance even if the primary purpose is to gather evidence of domestic criminal activity.

[5] *See Mayfield v. United States*, 504 F. Supp. 2d 1023, 1034 (D. Or. 2007) ("The government provides that derivative materials may include photocopies or photographs of documents from confidential client files in Mayfield 's law office, summaries and excerpts from the computer hard drives from the Mayfield law office and plaintiffs ' personal computers at home, analysis of plaintiffs ' personal bank records and bank records from Mayfield 's law office, analysis of client lists, websites visited, family financial activity, summaries of confidential conversations between husband and wife, parents

feared future uses of the materials as well as other future applications of FISA against him and his family.

Both Mayfield and the government moved for summary judgment. The government also moved to dismiss on the ground that Mayfield did not have standing to pursue the Fourth Amendment claim and therefore the court lacked jurisdiction. The court subsequently issued a decision denying the motion to dismiss and granting summary judgment to Mayfield. *See Mayfield v. United States*, 504 F. Supp. 2d 1023 (D. Or. 2007). The district court determined that it had jurisdiction because there was a live case or controversy that could be redressed with a declaratory judgment. *Id.* at 1034. As to the merits, the court held that the challenged provisions of FISA, namely 50 U.S.C. §§ 1804 and 1823, as amended by the PATRIOT Act, were unconstitutional because they violate the Fourth Amendment 's requirement of probable cause, and because they authorize FISA activities as long as a "significant purpose"—rather than the "primary purpose" required pre-Patriot Act—is to gather foreign intelligence information. *Id.* at 1032, 1042-43.

The government filed a timely appeal. The government argues that the district court did not have jurisdiction to hear Mayfield 's Fourth Amendment claim because a declaratory judgment will not redress Mayfield 's residual injuries. In addition, the government argues that the district court erred in declaring 50 U.S.C. §§ 1803 and 1823 unconstitutional. Finally, the government argues

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and children, and other private activities of a family 's life within their home. These materials, in a derivative form, have been distributed to various government agencies.").

that the district court improperly decided other issues that were outside the scope of the amended complaint and thus foreclosed by the settlement agreement.

II.

In the amended complaint, Mayfield sought a declaratory judgment that 50 U.S.C. §§ 1804 and 1823, as amended by the PATRIOT Act, are facially unconstitutional. Mayfield alleged that the government used the challenged provisions of the statute to conduct covert surveillance, searches of the family 's private quarters, and seizures of the family 's private materials. Mayfield further asserted that because the government obtained these materials unlawfully, and even though the government returned the physical materials, the continued retention of any derivative material was also unlawful. The purpose of the desired declaratory judgment was thus twofold: 1) to prevent future uses of FISA against Mayfield; and 2) to force the government to return or destroy all derivative materials in its possession obtained from Mayfield by unconstitutional means.

To bring suit in federal court, a plaintiff must establish three constitutional elements of standing. First, the plaintiff must have suffered an "injury in fact," the violation of a protected interest that is (a) "concrete and particularized," and (b) "actual or imminent." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Second, the plaintiff must establish a causal connection between the injury and the defendant 's conduct. *Id.* Third, the plaintiff must show a likelihood that the injury will be "redressed by a favorable decision." *Id.* (quoting *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 43 (1976)).

"[A] plaintiff must demonstrate standing separately for each form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., Inc.*, 528 U.S. 167, 185 (2000). Thus, a plaintiff who has standing to seek damages for a past injury, or injunctive relief for an ongoing injury, does not necessarily have standing to seek prospective relief such as a declaratory judgment. *See id.* at 185-86; *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983).

The government contends that the district court lacked jurisdiction over Mayfield 's claims because Mayfield lacks the requisite Article III standing. According to the government, Mayfield 's Fourth Amendment claim in the Amended Complaint is based on past injuries and speculation about the possibility of future injuries. Furthermore, as the government argues, the retention of derivative materials obtained from the FISA activities would not be affected by a declaratory judgment because there is no requirement that the government release or destroy the fruits of an unlawful search. The government thus asserts that Mayfield has not demonstrated that his injury is "imminent" or will be redressed by the relief sought. *See Defenders of Wildlife*, 504 U.S. at 560-61.

Standing is a question of law that we review de novo. *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 867 (9th Cir. 2002). We also review de novo a grant of summary judgment. *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1039 (9th Cir. 1999). The district court determined that Mayfield alleged an ongoing injury by the very fact of the government 's retention of derivative FISA materials. *Mayfield*, 504 F. Supp. 2d at 1034. The court further concluded that a judgment declaring the challenged statutory provisions unconstitutional would likely result in the government 's making reasonable efforts to destroy

the derivative materials in its possession. *Id.* We agree that Mayfield suffers an actual, ongoing injury, but do not agree that a declaratory judgment would likely redress that injury. *See Johnson v. Stuart*, 702 F.2d 193, 196 (9th Cir. 1983). We therefore reverse the judgment of the district court with regard to standing. We also vacate the district court 's judgment on the merits and do not address the question of whether the challenged provisions of FISA, as amended by the PATRIOT Act, are unconstitutional.

A. Ongoing Injury

To establish Article III standing, a plaintiff must show *inter alia* that he faces imminent injury on account of the defendant 's conduct. *Defenders of Wildlife*, 504 U.S. at 560. Past exposure to harmful or illegal conduct does not necessarily confer standing to seek injunctive relief if the plaintiff does not continue to suffer adverse effects. *Id.* at 564. Nor does speculation or "subjective apprehension" about future harm support standing. *Friends of the Earth*, 528 U.S. at 184; *see also Defenders of Wildlife*, 504 U.S. at 560. Once a plaintiff has been wronged, he is entitled to injunctive relief only if he can show that he faces a "real or immediate threat . . . that he will again be wronged in a similar way." *Lyons*, 461 U.S. at 111 (1983).

The government does not contest that Mayfield was subjected to surveillance, searches, and seizures authorized by FISA and the FISC. The government argues, however, that it acted under a unique set of circumstances that are highly unlikely to recur. The government further argues that any possibility that it will use the derivative materials in its possession is "wholly speculative." Mayfield responds that he continues to suffer harm as the

result of the FISA activities. He argues that the retention by government agencies of materials derived from the seizures in his home and office constitutes an ongoing violation of his constitutional right to privacy.

Although questions of standing are reviewed de novo, we will affirm a district court's ruling on standing when the court has determined that the alleged threatened injury is sufficiently likely to occur, unless that determination is clearly erroneous or incorrect as a matter of law. *Armstrong v. Davis*, 275 F.3d 849, 861 (9th Cir. 2001). In *Armstrong*, we enumerated two ways in which a plaintiff can demonstrate that such injury is likely to recur. *Id.* "First, a plaintiff may show that the defendant had, at the time of the injury, a written policy, and that the injury 'stems from ' that policy." *Id.* "Second, the plaintiff may demonstrate that the harm is part of a 'pattern of officially sanctioned . . . behavior, violative of the plaintiffs ' [federal] rights. ' " *Id.* (quoting *LaDuke v. Nelson*, 762 F.2d 1318, 1323 (9th Cir. 1985)) (alterations in original). Here, Mayfield asserts that his injury stems from the government 's application of the challenged FISA provisions, as amended by the PATRIOT Act. The causal link between the government 's actions and Mayfield 's injury is not disputed. Nor is the fact that the government 's actions were authorized by FISA, which constitutes both the "written policy" and "pattern of officially sanctioned behavior" that gave rise to standing under *Armstrong*. Based on the undisputed facts alleged in the amended complaint, the district court concluded that Mayfield "continue[s] to suffer a present, on-going injury due to the government 's continued retention of derivative material from the FISA seizure." *Mayfield*, 504 F. Supp. 2d at 1034. We agree with the district court 's determination.

B. Redressability

To establish standing, a plaintiff must also show that a favorable decision will likely redress his injury. *Defenders of Wildlife*, 504 U.S. at 560; *Levine v. Vilsack*, ___ F.3d ___, 2009 WL 3925075, at *4 (9th Cir. Nov. 20, 2009); *Chapman Pier 1 Imports (U.S.) Inc.*, 571 F.3d 853, 857 (9th Cir. 2009). When the lawsuit at issue challenges the legality of government action, and the plaintiff has been the object of the action, then it is presumed that a judgment preventing the action will redress his injury. *Defenders of Wildlife*, 504 U.S. at 561-62. Here, Mayfield seeks declaratory relief against the type of government action that indisputably caused him injury. He is thus entitled to a presumption of redressability.

The government argues that a declaration that the challenged provisions of FISA are unconstitutional would not require the government to destroy the derivative materials in its possession, and therefore would not redress Mayfield 's injury. The government is correct that it would not necessarily be required by a declaratory judgment to destroy or otherwise abandon the materials. *See, e.g., Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 362 (1998) (noting that a Fourth Amendment violation occurs at the moment of the illegal search or seizure, and that the subsequent use of the evidence obtained does not *per se* violate the Constitution); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1046 (1984) (holding that the Fourth Amendment does not provide a retroactive remedy for illegal conduct). The district court stated that a declaratory judgment would require the government to "act lawfully and make all reasonable efforts to destroy

the derivative materials." *Mayfield*, 504 F. Supp. 2d at 1034. But there is nothing in the declaratory judgment that would make it unlawful for the government to continue to retain the derivative materials.[6] To establish standing, Mayfield must show a "substantial likelihood" that the relief sought would redress the injury. *See Johnson*, 702 F.2d at 196. There is no such likelihood here.

We recently addressed standing in *Stormans, Inc. v. Selecky*, 571 F.3d 960 (9th Cir. 2009). In *Stormans*, pharmacy owners challenged—under the Free Exercise Clause—a Washington regulation requiring pharmacists to stock and dispense Plan B (emergency contraception). In holding that the pharmacy owners met the criteria for Article III standing, we found that their injury would be redressed by a judgment that the regulation was unconstitutional. *Id.* at 971. The connection in *Stormans* was direct: the regulation required the pharmacists to perform actions that they would not have to perform if the regulation were invalidated. *Id.* If the statutes challenged by Mayfield were declared unconstitutional, there will be no direct consequence to him. The government will not be required to act in any way that will redress Mayfield 's past injuries or prevent likely future injuries. Our opinion in *Stormans*, therefore, does not affect our holding here.

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[6] The district court stated "that 50 U.S.C. §§ 1804 and 1823, as amended by the Patriot Act, are unconstitutional because they violate the Fourth Amendment of the United States Constitution. Plaintiffs' Amended Complaint for declaratory relief is granted." *Mayfield*, F. Supp. 2d at 1042-43. The court did not address the legality of the government's retention of derivative materials.

We also recently addressed, in *Paulsen v. CNF Inc.*, a scenario analogous to Mayfield 's. 559 F.3d 1061 (9th Cir. 2009). In *Paulsen*, plaintiffs were prescription drug plan participants who brought suit against a benefits management company under ERISA § 502(a), 29 U.S.C. § 1132, alleging breach of fiduciary duty. *Id.* at 1073. Plaintiffs argued that if the court found in their favor, the plan's drug costs, contributions, and co-payments would decrease. *Id.* We found that the alleged injury was not redressable because the court's judgment would not compel the defendants to increase their disbursement of benefits payments. *Id.* at 1074. We thus held that plaintiffs lacked standing under Article III because "any prospective benefits depend on an independent actor who retains broad and legitimate discretion the courts cannot presume either to control or predict." *Id.* (internal citations omitted). Mayfield's situation resembles that of the plaintiffs in *Paulsen*, as redressability depends upon the actions of the government in response to the court 's judgment; as in *Paulsen*, such actions, in light of the unique circumstances of this case, are not within the control of the court.

III.

Mayfield unquestionably had standing to seek damages and injunctive relief when he filed the original complaint. The requirements for seeking such relief, however, differ from the requirements for seeking a declaratory judgment. *See Lyons*, 461 U.S. at 111. Having bargained away all other forms of relief, Mayfield is now entitled only to a declaratory judgment. Although it is undisputed that the government retains materials derived from the FISA searches and surveillance of Mayfield's property, the only relief that would redress this alleged Fourth Amendment violation is an injunction requiring the

government to return or destroy such materials. Under the terms of the settlement agreement, Mayfield cannot seek injunctive relief.[7] Nor is it likely that the government will return the materials of its own volition, as it is under no legal obligation to do so, and has stated in its brief that it does not intend to take such action. Finally, the district court did not—in conjunction with its opinion *sua sponte* order the government to return or destroy the derivative materials, but merely stated that "it is reasonable to assume that the Executive branch of the government will act lawfully and make all reasonable efforts to destroy the derivative materials when a final declaration of the unconstitutionality of the challenged provisions is issued." *Mayfield*, 504 F. Supp. 2d at 1034.

Given the limited remedy left open by the settlement agreement and the absence of any authority on which the district court could rely to insist *sua sponte* that the derivative materials be returned or destroyed, we must conclude that Mayfield lacks standing to pursue his Fourth Amendment claim. We therefore vacate the judgment of the district court without reaching the merits of Mayfield's Fourth Amendment claim, and we remand to the district court with directions to dismiss Mayfield's amended complaint.

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[7] *See* Stipulation for Compromise Settlement and Release ¶ 8 ("The parties agree that the sole claim that is not released as part of this settlement and that is at issue in such Amended Complaint is the plaintiffs' claim that 50 U.S.C. 1804 (relating to electronic surveillance under the Foreign Intelligence Surveillance Act) and 50 U.S.C. 1823 (relating to physical searches under such Act) violate the Fourth Amendment on their face, and the parties agree that the *sole relief* that will be awarded should the plaintiffs prevail on such claim is a declaratory judgment that one or both provisions is in violation of the Fourth Amendment . . . .") (emphasis added).

VACATED AND REMANDED

APPENDIX C:

ORDER AND OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (Mar. 24, 2010)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRANDON BIERI MAYFIELD, an individual; MONA MAYFIELD, appointed as Guardian Ad Litem per Order; SHANE MAYFIELD; SHARIA MAYFIELD; SAMIR MAYFIELD, individuals, by and through their guardian ad litem Mona Mayfield,

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA,

Defendant-Appellant.

No. 07-35865
D.C. No. CV-04-01427-AA

Appeal from the United States District Court
for the District of Oregon

ORDER AND OPINION

Ann L. Aiken, Chief District Judge, Presiding

Argued and Submitted February 5, 2009
Portland, Oregon

Filed March 24, 2010

Before: Richard A. Paez and Johnnie B. Rawlinson, Circuit Judges, and Raner C. Collins,* District Judge.

Opinion by Judge Paez

COUNSEL

Douglas Letter and Scott McIntosh, Civil Division, Department of Justice, Washington, D.C., for the appellant.

Elden Rosenthal, Rosenthal & Greene, P.C., Portland, Oregon, for the appellees.

ORDER

The government 's Motion to Correct Factual Misstatements in the Panel Opinion is GRANTED. The opinion filed December 10, 2009 and reported at 588 F.3d 1252, is vacated, and a new opinion is filed concurrently with this Order.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is denied. No further petitions for rehearing shall be filed.

IT IS SO ORDERED.

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* The Honorable Raner C. Collins, United States District Judge for the District of Arizona, sitting by designation.

OPINION

PAEZ, Circuit Judge:

In this appeal, we must decide whether Plaintiffs-Appellees Brandon Mayfield, a former suspect in the 2004 Madrid train bombings, and his family, have standing to seek declaratory relief against the United States that several provisions of the Foreign Intelligence Surveillance Act ("FISA") as amended by the PATRIOT Act are unconstitutional under the Fourth Amendment of the U.S. Constitution. Although Mayfield settled the bulk of his claims against the government, the Stipulation for Compromise Settlement and Release (the "Settlement Agreement") allowed him to pursue his Fourth Amendment claim. According to the terms of the Settlement Agreement, the only relief available to Mayfield, if he were to prevail on his Fourth Amendment claim, is a declaratory judgment. He may not seek injunctive relief. We hold that, in light of the limited remedy available to Mayfield, he does not have standing to pursue his Fourth Amendment claim because his injuries already have been substantially redressed by the Settlement Agreement, and a declaratory judgment would not likely impact him or his family. We thus vacate the judgment of the district court.

I.

On March 11, 2004, terrorists ' bombs exploded on commuter trains in Madrid, Spain, killing 191 people and injuring another 1600 people, including three U.S. citizens.[1] Shortly after the

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[1] Under the terms of the parties ' Settlement Agreement, the parties agreed that plaintiffs ' Fourth Amendment claim would be litigated solely on the basis of the

bombings, the Spanish National Police ("SNP") recovered fingerprints from a plastic bag containing explosive detonators. The bag was found in a Renault van located near the bombing site. On March 13, 2004, the SNP submitted digital photographs of the fingerprints to Interpol Madrid, which then transmitted them to the FBI in Quantico, Virginia.

The FBI searched fingerprints in its own computer system, attempting to match the prints received from Spain. On March 15, 2004, an FBI computer produced 20 candidates whose known prints had features in common with what was identified as Latent Finger Print #17 ("LFP #17"), one of whom was Brandon Mayfield.

Mayfield is a U.S. citizen, born in Oregon and brought up in Kansas. He lives with his wife and three children in Aloha, Oregon, a suburb of Portland. He is 43 years old, a former Army officer with an honorable discharge, and a practicing lawyer. Mayfield is also a Muslim with strong ties to the Muslim community in Portland.

Amended Complaint for Declaratory Relief ("Amended Complaint"), the parties ' Recitation of Stipulated Facts, and memoranda of law. Under the terms of the Settlement Agreement, the government was not required to file an answer to the Amended Complaint. Thus, the government neither admitted nor denied the factual allegations in the operative complaint. The government did, however, stipulate, for purposes of this litigation only, to the facts recited in the Recitation of Stipulated Facts. Accordingly, for purposes of this opinion, we rely on the undisputed facts set forth in the Recitation of Stipulated Facts and, where additional context is necessary, the factual allegations in the Amended Complaint. Our discussion of Mayfield 's personal and family history is taken from the district court 's opinion.

On March 17, 2004, FBI Agent Green, a fingerprint specialist, concluded that Mayfield 's left index fingerprint matched LFP #17. Green then submitted the fingerprints for verification to Massey, a former FBI employee who continued to contract with the FBI to perform forensic analysis of fingerprints. Massey verified that Mayfield 's left index fingerprint matched LFP #17. The prints were then submitted to a senior FBI manager, Wieners, for additional verification. Wieners also verified the match.

On March 20, 2004, the FBI issued a formal report matching Mayfield 's print to LFP #17. The next day, FBI surveillance agents began to watch Mayfield and follow him and members of his family when they traveled to and from the mosque, Mayfield 's law office, the children 's schools, and other family activities. As detailed in the Recitation of Stipulated Facts, the FBI also applied to the Foreign Intelligence Security Court ("FISC") for authorization to "collect foreign intelligence information." Pursuant to that authorization, the FBI conducted "covert physical searches of the Mayfield home," and "electronic surveillance targeting Mr. Mayfield at the Mayfield home and at Mr. Mayfield 's law office."

In April 2004, the FBI sent Mayfield 's fingerprints to the Spanish government. The SNP examined the prints and the FBI 's report, and concluded that there were too many unexplained dissimilarities between Mayfield 's prints and LFP #17 to verify the match. When FBI agents then met with their Spanish counterparts in Madrid, the Spanish investigators refused to validate the FBI 's conclusion that there was a match.

After the meeting with the SNP, the FBI submitted an affidavit to the district court, stating that experts considered LFP #17 a "100% positive identification" of Mayfield. The affidavit also included information about Mayfield 's religious practice and association with other Muslims. On May 4, 2004, the government named Brandon Mayfield as a material witness and filed an application for material witness order. The district court appointed an independent fingerprint expert, Kenneth Moses, to analyze the prints in question. Mayfield and his defense attorneys approved the appointment. Moses concluded that LFP #17 was from Mayfield 's left index finger.

The district court issued several search warrants, which resulted in the search of Mayfield 's home and office, and the seizure of his computer and paper files. On May 6, 2004, Mayfield was arrested and imprisoned for two weeks. Mayfield alleged that his family was not told where he was being held, but was told that his fingerprints matched those of the Madrid train bomber, and that he was the prime suspect in a crime punishable by death. While Mayfield was detained, national and international headlines declared him to be linked to the Madrid bombings. On May 20, 2004, news reports revealed that Spain had matched LFP #17 with a man named Ouhane Daoud, an Algerian citizen. Mayfield was released from prison the following day.

On October 4, 2004, Mayfield, his wife, and his children[2] filed suit against the government in the United States District Court for the District of

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[2] Because the family 's claims are identical to Mayfield 's, we refer to all plaintiffs collectively as "Mayfield."

Oregon. The complaint alleged a *Bivens*[3] claim for unlawful arrest and imprisonment and unlawful searches, seizures, and surveillance in violation of the Fourth Amendment; a claim under the Privacy Act, 5 U.S.C. § 552a, for leaking information from the FBI and DOJ to media sources regarding Brandon Mayfield 's arrest; a claim for the return of property improperly seized; and a Fourth Amendment challenge to the constitutionality of several FISA provisions and the PATRIOT Act.

Mayfield reached a settlement with the government, and the district court approved it on November 29, 2006. The Settlement Agreement provided that the government would pay compensatory damages of $2 million to Mayfield and his family; destroy documents relating to the electronic surveillance conducted pursuant to FISA; return seized "material witness materials" to Mayfield; and apologize to Mayfield and his family. In return, Mayfield agreed to release the government of all liability or further litigation, except as to one specific claim: that 50 U.S.C. §§ 1804 (authorizing electronic surveillance under FISA) and 1823 (authorizing physical searches under FISA) violate the Fourth Amendment of the U.S. Constitution. The parties agreed that the sole relief that Mayfield could seek or that the court could award with regard to this claim would be a declaratory judgment.

On December 6, 2006, Mayfield filed an Amended Complaint for Declaratory Judgment. The Amended Complaint challenged the constitutionality of 50 U.S.C. §§ 1804 and 1823, the portions of FISA,

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[3] *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

as amended by the PATRIOT Act,[4] that allow the government to conduct physical searches, electronic surveillance, and wiretaps of residences and offices without requiring proof of probable cause or an assertion that the primary purpose of such activities is to gather foreign intelligence information. The complaint asserted that the statutory provisions were facially unconstitutional. Mayfield alleged that he continued to suffer injury because the government refused to identify and destroy all materials derived from the FISA searches and seizures,[5] and that he feared future uses of the materials as well as other future applications of FISA against him and his family.

Both Mayfield and the government moved for summary judgment. The government also moved to dismiss on the ground that Mayfield did not have standing to pursue the Fourth Amendment claim and therefore the court lacked jurisdiction. The court subsequently issued a decision denying the motion to

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[5] Although the settlement agreement required the government to destroy or return to Mayfield certain FISA material that it acquired or seized pursuant to the FISA electronic surveillance and search authority targeting Mayfield, the government was not required to destroy any derivative material contained in government files. The Recitation of Stipulated Facts acknowledges that "[s]ome derivative materials . . . remain in government files at present."

dismiss and granting summary judgment to Mayfield. *See Mayfield v. United States*, 504 F. Supp. 2d 1023 (D. Or. 2007). The district court determined that it had jurisdiction because there was a live case or controversy that could be redressed with a declaratory judgment. *Id.* at 1034. As to the merits, the court held that the challenged provisions of FISA, namely 50 U.S.C. §§ 1804 and 1823, as amended by the PATRIOT Act, were unconstitutional because they violate the Fourth Amendment 's requirement of probable cause, and because they authorize FISA activities as long as a "significant purpose"—rather than the "primary purpose" required pre-Patriot Act—is to gather foreign intelligence information. *Id.* at 1032, 1042-43.

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because the government obtained these materials unlawfully, and even though the government returned the physical materials, the continued retention of any derivative material was also unlawful. The purpose of the desired declaratory judgment was thus twofold: 1) to prevent future uses of FISA against Mayfield; and 2) to force the government to return or destroy all derivative materials in its possession obtained from Mayfield by unconstitutional means.[6]

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"[A] plaintiff must demonstrate standing separately for each form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., Inc.*, 528 U.S. 167, 185 (2000). Thus, a plaintiff who has standing to seek damages for a past injury, or injunctive relief for an ongoing injury, does not necessarily have standing to seek prospective relief such as a declaratory judgment. *See id.* at 185-86; *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983).

The government contends that the district court lacked jurisdiction over Mayfield 's claims because Mayfield lacks the requisite Article III standing. According to the government, Mayfield 's Fourth Amendment claim in the Amended Complaint is based on past injuries and speculation about the possibility of future injuries. Furthermore, as the government argues, the retention of derivative materials obtained from the FISA activities would not be affected by a declaratory judgment because there is no requirement that the government release or destroy the fruits of an unlawful search. The government thus asserts that Mayfield has not demonstrated that his injury is "imminent" or will be redressed by the relief sought. *See Defenders of Wildlife*, 504 U.S. at 560-61.

Standing is a question of law that we review de novo. *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 867 (9th Cir. 2002). We also review de novo a grant of summary judgment.

Hodgers-Durgin v. De La Vina, 199 F.3d 1037, 1039 (9th Cir. 1999). The district court determined that Mayfield alleged an ongoing injury by the very fact of the government 's retention of derivative FISA materials. *Mayfield*, 504 F. Supp. 2d at 1034. The court further concluded that a judgment declaring the challenged statutory provisions unconstitutional

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would likely result in the government's making reasonable efforts to destroy the derivative materials in its possession. *Id.* We agree that Mayfield suffers an actual, ongoing injury, but do not agree that a declaratory judgment would likely redress that injury. *See Johnson v. Stuart*, 702 F.2d 193, 196 (9th Cir. 1983). We therefore reverse the judgment of the district court with regard to standing. We also vacate the district court 's judgment on the merits and do not address the question of whether the challenged provisions of FISA, as amended by the PATRIOT Act, are unconstitutional.

A. Ongoing Injury

To establish Article III standing, a plaintiff must show *inter alia* that he faces imminent injury on account of the defendant 's conduct. *Defenders of Wildlife*, 504 U.S. at 560. Past exposure to harmful or illegal conduct does not necessarily confer standing to seek injunctive relief if the plaintiff does not continue to suffer adverse effects. *Id.* at 564. Nor does speculation or "subjective apprehension" about future harm support standing. *Friends of the Earth*, 528 U.S. at 184; *see also Defenders of Wildlife*, 504 U.S. at 560. Once a plaintiff has been wronged, he is entitled to injunctive relief only if he can show that he faces a "real or immediate threat . . . that he will again be wronged in a similar way." *Lyons*, 461 U.S. at 111 (1983).

The government does not contest that Mayfield was subjected to surveillance, searches, and seizures authorized by FISA and the FISC. The government argues, however, that it acted under a unique set of circumstances that are highly unlikely to recur. The government further argues that any possibility that it will use the derivative materials in its possession is "wholly speculative." Mayfield

responds that he continues to suffer harm as the result of the FISA activities. He argues that the retention by government agencies of materials derived from the seizures in his home and office constitutes an ongoing violation of his constitutional right to privacy.

Although questions of standing are reviewed de novo, we will affirm a district court's ruling on standing when the court has determined that the alleged threatened injury is sufficiently likely to occur, unless that determination is clearly erroneous or incorrect as a matter of law. *Armstrong v. Davis*, 275 F.3d 849, 861 (9th Cir. 2001). In *Armstrong*, we enumerated two ways in which a plaintiff can demonstrate that such injury is likely to recur. *Id.* "First, a plaintiff may show that the defendant had, at the time of the injury, a written policy, and that the injury 'stems from' that policy." *Id.* "Second, the plaintiff may demonstrate that the harm is part of a 'pattern of officially sanctioned . . . behavior, violative of the plaintiffs' [federal] rights.'" *Id.* (quoting *LaDuke v. Nelson*, 762 F.2d 1318, 1323 (9th Cir. 1985)) (alterations in original). Here, Mayfield asserts that his injury stems from the government's application of the challenged FISA provisions, as amended by the PATRIOT Act. The causal link between the government's actions and Mayfield 's injury is not disputed. Nor is the fact that the government's actions were authorized by FISA, which constitutes both the "written policy" and "pattern of officially sanctioned behavior" that gave rise to standing under *Armstrong*. Based on the undisputed facts, the district court concluded that Mayfield "continue[s] to suffer a present, on-going injury due to the government 's continued retention of derivative material from the FISA seizure." *Mayfield*, 504 F. Supp. 2d at 1034. We agree with the district court's determination.

B. Redressability

To establish standing, a plaintiff must also show that a favorable decision will likely redress his injury. *Defenders of Wildlife*, 504 U.S. at 560; *Levine v. Vilsack*, 587 F.3d 986, 991-92 (9th Cir. 2009). When the lawsuit at issue challenges the legality of government action, and the plaintiff has been the object of the action, then it is presumed that a judgment preventing the action will redress his injury. *Defenders of Wildlife*, 504 U.S. at 561-62. Here, Mayfield seeks declaratory relief against the type of government action that indisputably caused him injury. He is thus entitled to a presumption of redressability.

The government argues that a declaration that the challenged provisions of FISA are unconstitutional would not require the government to destroy the derivative materials in its possession, and therefore would not redress Mayfield's injury. The government is correct that it would not necessarily be required by a declaratory judgment to destroy or otherwise abandon the materials. *See, e.g., Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 362 (1998) (noting that a Fourth Amendment violation occurs at the moment of the illegal search or seizure, and that the subsequent use of the evidence obtained does not *per se* violate the Constitution); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1046 (1984) (holding that the Fourth Amendment does not provide a retroactive remedy for illegal conduct). The district court stated that a declaratory judgment would require the government to "act lawfully and make all reasonable efforts to destroy the derivative materials." *Mayfield*, 504 F. Supp. 2d at 1034. But there is nothing in the declaratory judgment that would make it unlawful for the government to continue to retain the derivative

materials.[7] To establish standing, Mayfield must show a "substantial likelihood" that the relief sought would redress the injury. *See Johnson*, 702 F.2d at 196. There is no such likelihood here.

We recently addressed standing in *Stormans, Inc. v. Selecky*, 571 F.3d 960 (9th Cir. 2009). In *Stormans*, pharmacy owners challenged—under the Free Exercise Clause—a Washington regulation requiring pharmacists to stock and dispense Plan B (emergency contraception). In holding that the pharmacy owners met the criteria for Article III standing, we found that their injury would be redressed by a judgment that the regulation was unconstitutional. *Id.* at 971. The connection in *Stormans* was direct: the regulation required the pharmacists to perform actions that they would not have to perform if the regulation were invalidated. *Id.* If the statutes challenged by Mayfield were declared unconstitutional, there will be no direct consequence to him. The government will not be required to act in any way that will redress Mayfield's past injuries or prevent likely future injuries. Our opinion in *Stormans*, therefore, does not affect our holding here.

We also recently addressed, in *Paulsen v. CNF Inc.*, a scenario analogous to Mayfield 's. 559 F.3d 1061 (9th Cir. 2009). In *Paulsen*, plaintiffs were prescription drug plan participants who brought suit against a benefits management company under

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[7] The district court stated "that 50 U.S.C. §§ 1804 and 1823, as amended by the Patriot Act, are unconstitutional because they violate the Fourth Amendment of the United States Constitution. Plaintiffs ' Amended Complaint for declaratory relief is granted." *Mayfield*, 504 F. Supp. 2d at 1042-43. The court did not address the legality of the government 's retention of derivative materials.

ERISA § 502(a), 29 U.S.C. § 1132, alleging breach of fiduciary duty. *Id.* at 1073. Plaintiffs argued that if the court found in their favor, the plan's drug costs, contributions, and co-payments would decrease. *Id.* We found that the alleged injury was not redressable because the court's judgment would not compel the defendants to increase their disbursement of benefits payments. *Id.* at 1074. We thus held that plaintiffs lacked standing under Article III because "any prospective benefits depend on an independent actor who retains broad and legitimate discretion the courts cannot presume either to control or predict." *Id.* (internal citations omitted). Mayfield's situation resembles that of the plaintiffs in *Paulsen*, as redressability depends upon the actions of the government in response to the court's judgment; as in *Paulsen*, such actions, in light of the unique circumstances of this case, are not within the control of the court.

III.

Mayfield unquestionably had standing to seek damages and injunctive relief when he filed the original complaint. The requirements for seeking such relief, however, differ from the requirements for seeking a declaratory judgment. *See Lyons*, 461 U.S. at 111. Having bargained away all other forms of relief, Mayfield is now entitled only to a declaratory judgment. Although it is undisputed that the government retains materials derived from the FISA searches and surveillance of Mayfield's property, the only relief that would redress this alleged Fourth Amendment violation is an injunction requiring the government to return or destroy such materials. Under the terms of the Settlement Agreement,

Mayfield cannot seek injunctive relief.[8] Nor is it likely that the government will return the materials of its own volition, as it is under no legal obligation to do so, and has stated in its brief that it does not intend to take such action. Finally, the district court did not—in conjunction with its Opinion and Order *sua sponte* order the government to return or destroy the derivative materials, but merely stated that "it is reasonable to assume that the Executive branch of the government will act lawfully and make all reasonable efforts to destroy the derivative materials when a final declaration of the unconstitutionality of the challenged provisions is issued." *Mayfield*, 504 F. Supp. 2d at 1034.

Given the limited remedy left open by the Settlement Agreement and the absence of any authority on which the district court could rely to insist *sua sponte* that the derivative materials be returned or destroyed, we must conclude that Mayfield lacks standing to pursue his Fourth Amendment claim. We therefore vacate the judgment of the district court without reaching the merits of Mayfield's Fourth Amendment claim, and we remand to the district court with directions to dismiss Mayfield's Amended Complaint.

VACATED AND REMANDED.

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[8] Paragraph 8 of the Settlement Agreement stated: "The parties agree that the sole claim that is not released as part of this settlement and that is at issue in such Amended Complaint is the plaintiffs' claim that 50 U.S.C. 1804 (relating to electronic surveillance under the Foreign Intelligence Surveillance Act) and 50 U.S.C. 1823 (relating to physical searches under such Act) violate the Fourth Amendment on their face, and the parties agree that the *sole relief* that will be awarded should the plaintiffs prevail on such claim is a declaratory judgment that one or both provisions is in violation of the Fourth Amendment . . . ." (emphasis added).

APPENDIX D:

STIPULATION FOR COMPROMISE SETTLEMENT AND RELEASE (Nov. 27, 2006)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BRANDON MAYFIELD, et al.,

Plaintiffs,

v.

UNITED STATES OF AMERICA, et al.,

Defendants.

Civil Action No. CV06-305AA

BRANDON MAYFIELD, et al.,

Plaintiffs,

v.

ALBERTO R. GONAZALES, et al.,

Defendants.

Civil Action No. CV04-1427AA

STIPULATION FOR COMPROMISE
SETTLEMENT AND RELEASE

It is hereby stipulated by and between the undersigned plaintiffs and defendants, by and through their respective attorneys, as follows;

1. Except as specifically provided in paragraph 8 below, the United States of America agrees, in full settlement and satisfaction of any and all claims, demands, rights, and causes of action of whatsoever kind and nature for monetary, injunctive, declaratory, or any other form of relief, arising directly or indirectly from or by reason of any and all injury or damage of any kind (including but not limited to bodily and personal injury (including emotional injury); death, injury to or loss of property, the consequences of any such injury, death. or loss, and attorney 's fees or other legal costs), whether known or unknown and whether foreseen or unforseen, resulting, or to result from, or relating to, the subject matter of the above-captioned actions, that plaintiffs or their guardians, heirs, executors. administrators, or assigns, and each of them, now have or may hereafter acquire, against the United States of America, its agents, servants, employees, and contractors, or any other person or entity, to:

a. pay the sums of $1,900,000.00 to Brandon Mayfield, $25,000.00 to Mona Mayfield, $25,000.00 to Shane Mayfield, $25,000.00 to Sharia Mayfield, and $25,000.00 to Samir Mayfield, said entire Two Million Dollars ($2,000,000.00) to be paid as described. in paragraph 3 below;

b. destroy the FISA take, as defined in paragraph 4 below;

c return the copies of the material witness materials to the plaintiffs, as defined in paragraph 5 below; and

d. apologize to the plaintiffs, as spelled out in Attachment 3 hereto.

2. Except. as specifically provided in paragraph 8 below, the plaintiffs and their guardians, heirs, executors, administrators, and assigns, and each of them, agree to release, reimburse, indemnify, and hold harmless the United States of America, its agents, servants, employees, and contractors (including but not limited to Alberto R. Gonzales, John Ashcroft., Richard K. Werder, Terry Green, Michael Wieners, Eduardo Sanchez and John T. Massey) from and against any liability or further or future litigation or pursuit by any of the plaintiffs, their guardians, heirs, executors, administrators, or assigns of any claim encompassed by paragraph 1 above against any person or entity; and the defendants and their guardians, heirs, executors, administrators, and assigns, and each of them, agree to release, reimburse, indemnify, and hold harmless the p1a.intiffs from and against any liability or further or future litigation or pursuit by any of the defendants, their guardians, heirs, executors, administrators, or assigns of any claim . encompassed by paragraph 1 above against the plaintiffs or any of them.

3. Payment of the Two Million Dollars referenced in paragraph 1.a. above will be made by one government wire transfer to the trust account of plaintiffs ' attorney Gerry Spence. Plaintiffs ' attorneys agree to obtain a dismissal of the above-captioned actions with prejudice (including any appellate proceedings pending in either such action, and including appeal No. 04-30432 (9th Cir.) in the material witness proceeding, *In re: Federal Grand Jury* 03-01, Misc.. No. 04--MC-9071 (D. Or.)), except as specifically provided in paragraph 8 below, with

each party bearing its own fees, costs, and expenses.

4. The term "the FTSA take," as referenced in paragraph 1.b. above, is defined for purposes of this Stipulation for Compromise Settlement and Release as the communications intercepts that were acquired by the FBI pursuant to the FISA electronic surveillance authority targeting Brandon Mayfield and the materials that were seized or reproduced by the FBI pursuant to the FlSA physical search authority targeting Brandon Mayfield. Any materials, in whatever form or place, derived directly or indirectly from or related to the FISA take as defined herein that are not included within the above definition of such term shall be known as "derivative FISA materials." The government's obligation under paragraph 1.b. above does not extend to derivative FISA materials.

5. The term "the copies of the material witness materials," as referenced in paragraph 1.e. above, is defined for purposes of this Stipulation for Compromise Settlement and Release as the copies, retained by the government pursuant to the Order of September 20,2004 of the Honorable Judge Jones of this Court after the originals had been returned to the plaintiffs, of the materials seized pursuant to search warrants issued by the U.S. District Court for the District of Oregon in May *2004* in *In re: Federal Grand Jury* 03-01, Misc. No. 040MC-91J71, No. 04-MC-9070 {A)-(F), and No. 04-MC-9072 relating to the plaintiffs, except that such term does not include the classified National Defense Document that was seized pursuant to such search warrants. The plaintiffs agree that Elden M. Rosenthal, counsel for the plaintiffs will return the copies of the material witness materials for three years following the date on which this Stipulation for Compromise Settlement

and Release is approved by this Court, and that Mr. Rosenthal will make such copies available in response to a request from an appropriate authority in connection with an official investigation or proceeding.

6. This Stipulation for Compromise Settlement and Release is not, and should not be construed as, an admission of liability or fault on the part of the United States, its agents, servants, employees, or contractors. This settlement is entered into by the parties for the purpose of compromising disputed claims and avoiding the expenses and risks of further litigation.

7. It is agreed. by and among the parties that each party will bear his, her, or its own costs, fees, and expenses and that any attorney 's fees owed by the plaintiffs will be paid out of the settlement amount and not in addition thereto.

8. As indicated in paragraph 2 above, the parties agree that there is one specific claim that is not resolved as part of this settlement. As part of this Stipulation for Compromise Settlement and Release, the United States agrees not to oppose the filing of the plaintiffs' Proposed Amended Complaint (Attachment 1 hereto), and as part of this Court's approval of this Stipulation for Compromise Settlement and Release (as described further in paragraph 11 below) this Court grants leave for the plaintiffs to file such Amended Complaint. The parties agree that the sole claim that is not released as part of this settlement and that is at issue in such Amended Complaint is the plaintiffs ' claim that 50 U.S.C. 1804 (relating to electronic surveillance under the Foreign Intelligence Surveillance Act) and 50 U.S.C. 1823 (relating to physical searches under such

Act) violate the Fourth Amendment on their face, and the parties agree that the sale relief that will be awarded should the plaintiffs prevail on such claim is a declaratory judgment that one or both of such provisions ,is in violation of the Fourth Amendment and that. if such a declaratory judgment is entered with respect to one or both of such provisions and becomes final and not subject to further judicial review, the United States shall not use such provisions(s) with respect to the plaintiffs. The parties further agree that this claim will be litigated based solely on the Amended Complaint, the parties' Recitation of Stipulated Facts (Attachment 2 hereto), and memoranda of law, and that no answer to the Amended Complaint will be filed; no discovery, evidentiary hearing, or other factual proceedings of any kind will occur at any stage; and the plaintiffs' complaint will not be further amended. The parties further agree that the United States reserves the right to raise any and all defenses and arguments, including but not limited to lack of jurisdiction, in opposition to such claim, and. that the United States does not necessarily agree with the allegations of the Amended Complaint, but that the United States stipulates, for purposes of this litigation only, to the facts recited in the Recitation of Stipulated Facts.

9. The persons signing this Stipulation for Compromise Settlement and Release warrant and represent that they possess full authority to bind the persons on whose behalf they cue signing to the terms of the settlement. As to the plaintiffs who are minors, the plaintiffs must obtain court approval of the settlement at their expense. The plaintiffs agree to obtain such approval in a timely manner, time being of the essence. In the event the plaintiffs fail or are unable to obtain such court approval, this Stipulation for Compromise Settlement and Release

is null and void. Plaintiffs further agree that the United States may void this settlement at its option in the event such approval is not obtained in a timely manner.

10. The parties agree that this Stipulation for Compromise Settlement and Release, including all attachments, may be made public in its entirety, and the plaintiffs expressly consent to such release and disclosure pursuant to 5 U.S.C. § 552a(b).

11. The parties' agreement is conditioned upon this Court 's approval of all terms of this Stipulation for Compromise Settlement and Release, including all attachments. If this Court does not approve all terms of this Stipulation for Compromise Settlement and Release, including all attachments, this Stipulation for Compromise Settlement and Release is null and void.

12. It is contemplated that this Stipulation for Compromise Settlement and Release may be executed in several counterparts, with a separate signature page for each party. All such counterparts and signature pages, together, will be deemed to be one document.

Executed this 27th day of November, 2006.

Executed this 27th day of November, 2006.

/s/Brandon Mayfield, Plaintiff

/s/Mona Mayfield, Plaintiff

/s/Mona Mayfield, as guardian *ad litem* for Sharia Mayfield, Plaintiff

/s/Mona Mayfield, as guardian *ad litem* for Samir Mayfield, Plaintiff

Approved as to this form: The Spence Law Firm, LLC

/s/Gerry Spence, of Attorneys for Plaintiff

/s/Elden M. Rosenthal, of Attorneys for Plaintiff

/s/ Michele Longo Elder, of Attorneys for Plaintiff

Executed this 24th day of November, 2006.

/s/Shane Mayfield, Plaintiff

Executed this 20th day of November, 2006.

/s/Elizabeth J. Shapiro, Attorney for Defendants United States of America, Federal Bureau of Investigation, Department of Justice and Alberto Gonzales

Executed this 16th day of November, 2006.

/s/Richard K. Werder, Defendant

Executed this 17th day of November, 2006.

/s/Terry Green, Defendant

Executed this 16th day of November, 2006.

/s/Michael Wieners, Defendant

Executed this 17th day of November, 2006.

/s/Eduardo Sanchez, Defendant

Executed this 16th day of November, 2006.

/s/John T. Massey, Defendant

Approved as to form: Greenspun, Davis & Leary, P.C.

/s/Christie A. Leary, of Attorneys for Defendant Massey

Approved this 29th day of November, 2006:

/s/The Honorable Ann. L. Aiken
United States District Judge

APPENDIX E:

AMENDED COMPLAINT FOR DECLARATORY JUDGMENT (Nov. 27, 2006)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BRANDON MAYFIELD, an individual, MONA MAYFIELD, an individual, and SHANE MAYFIELD, SHARIA MAYFIELD, and SAMIR MAYFIELD, individuals, by and through their guardian ad litem Mona Mayfield,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

CASE NO. CV-04-1427-PA

AMENDED COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiffs allege:

INTRODUCTION

1. The Foreign Intelligence Surveillance Act (FISA), as amended by the Patriot Act, permits the federal government to secure search warrants authorizing covert physical searches of residences and law offices, and also permits the federal government to secure warrants authorizing electronic surveillance and wiretaps of residences

and law offices. The covert physical searches, electronic surveillance and wiretaps permitted by FISA, as amended by the Patriot Act, may be authorized by the Foreign Intelligence Security Court (FISC) without the federal government even claiming that there is probable cause to believe the target of the searches or surveillance has committed a crime. The covert physical searches, electronic surveillance and wiretaps permitted by FISA, as amended by the Patriot Act, may be authorized by the FISC even if the primary purpose of the requested searches and electronic surveillance is not the collection of foreign intelligence.

2. This Amended Complaint challenges the constitutionality of those portions of FISA, as amended by the Patriot Act, that allow the FISC to authorize covert physical searches, electronic surveillance and wiretaps of residences and law offices without requiring the federal government to prove there is probable cause that the target of the requested searches and/or surveillance committed a crime, or without requiring the federal government to assert the primary purpose of the activities is to gather foreign intelligence. This Amended Complaint challenges the constitutionality of these provisions of FISA, as amended by the Patriot Act, on their face and not as applied in respect to Plaintiffs.

PARTIES

3. Brandon Mayfield, his wife Mona Mayfield, and their children Shane Mayfield, Sharia Mayfield, and Samir Mayfield are United States citizens living in Oregon. Mona Mayfield is the duly appointed guardian *ad litem* of said children.

JURISDICTION

4. This Court has jurisdiction of these claims pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1343(a)(3), and 28 U.S.C. § 2201.

FACTUAL ALLEGATIONS

5. On March 11, 2004, in Madrid, Spain, terrorists' bombs exploded on commuter trains, murdering 191 persons, and injuring another 1600 persons, including three U.S. citizens. International horror echoed the feelings Americans experienced after the cataclysm of September 11th. Shortly after the bombings, the Spanish National Police (''SNP'') recovered fingerprints from a plastic bag containing explosive detonators. The bag was found in a Renault van located near the site of the carnage.

6. On March 13, 2004, the SNP submitted digital photographs of the latent fingerprints lifted from the bag to Interpol Madrid, which then transmitted the digital photographs to the FBI in Quantico, Virginia.

7. On or about March 17, 2004, FBI Senior Fingerprint Examiner Terry Green erroneously concluded that Mr. Mayfield's left index fingerprint matched LFP #17, the fingerprint discovered by the SNP.

8. On or about March 20, 2004, the FBI issued a formal report erroneously matching Mr. Mayfield's print and LFP #17.

9. At some point in time after the FBI's wrongful fingerprint identification, the FBI made application to the Foreign Intelligence Security Court (FISC) for an order authorizing the FBI to:

a. Place electronic listening devices ("bugs") in the shared and intimate rooms of the Mayfield family home;

b. Execute repeated covert searches of the Mayfield family home, occurring when the family was away from the home, which, to add insult to injury, were performed so incompetently that the FBI left traces of their searches behind, causing the Mayfield family to be frightened and believe that they had been burglarized;

c. Execute covert searches of the Law Office of Brandon Mayfield and examine confidential client materials;

d. Place electronic listening devices ("bugs ' ') in the Law Office of Brandon Mayfield; and

e. Place wiretaps on Mr. Mayfield 's office and home phones.

10. The application for the. FISA order before the FISC was personally approved by John Ashcroft, then the Attorney General of the United States. The application did not assert that there was probable cause that Brandon Mayfield, or any member of his family, had committed a crime. The application did not assert that the primary purpose of the requested covert physical searches and

requested electronic surveillance was the collection of foreign intelligence. Instead, pursuant to the Patriot Act, the application asserted only that "a significant purpose" of the requested covert physical searches and requested electronic surveillance was the collection of foreign intelligence. The applications were approved by the FISC, acting in accordance with FISA as amended by the Patriot Act.

11. Pursuant to the orders of the FISC, the FBI performed covert physical searches of the Mayfield home and the law office of Brandon Mayfield.

12. Pursuant to orders of the FISC, the FBI also conducted electronic surveillance targeting Mr. Mayfield at the Mayfield home and at Mr. Mayfield 's law office.

13. FBI agents took approximately 335 photographs inside the Mayfield residence, and additional photographs were also taken inside Mr. Mayfield 's law office, by FBI agents during the FISC-authorized searches.

14. It is unknown to Mr. Mayfield what, exactly, the U.S. government learned from Spain between March 17th and April 2nd. On April 2nd the FBI sent Mr. Mayfield's fingerprints to Spain. By that date it is believed that the U.S. government had already been advised by the Spanish government that Moroccan immigrants were suspects in the Madrid bombing and had been taken into custody, and that the Spanish government was not aware of any information connecting the Moroccans with Mr. Mayfield or anyone in the U.S.

15. The SNP examined the FBI's report,

and Mr. Mayfield's fingerprints, and concluded that there were dissimilarities in the comparison ,of the two prints for which there was no explanation. On April 13th the SNP provided a written report to the FBI explaining that they had compared LFP #17 to Mr. Mayfield's fingerprints, and stated their conclusion *that there was no match.*

16. Despite having been told by the SNP that LFP #17 and Mr. Mayfield's print were not a match, knowing what was at stake and in the furtherance of their own personal and institutional interests, the FBI personnel continued to insist that their match of the prints was correct.

17. On April 21, 2004, the FBI sent one or more agents to Madrid, Spain, to meet with their Spanish counterparts. Their intent and purpose was to exert whatever influence and pressure necessary to convince the SNP of the correctness of the FBI match. Spanish sources have publicly stated that still the Spanish authorities who met with the FBI agents on April 21st "refused to validate" the FBI 's conclusion that LFP #17 and the known print of Mr. Mayfield were a match.

18. The FBI remained undaunted. Even though the FBI's claim that LFP # 1 7 matched Mr. Mayfield's left index finger was directly and competently challenged by the SNP, the FBI sought to bolster its conclusion by the collection of hoped for corroboration. The FBI continued to use the powers and secrecy of FISA, as amended by the Patriot Act, to perform covert physical searches of Brandon Mayfield's home and law office, and to conduct electronic surveillance, including wiretaps of Mr. Mayfield's home and law office. However, the government's intensive surveillance and

investigation of Mr. Mayfield uncovered no criminal links whatsoever with Spain or the Madrid bombings.

19. On May 6, 2006, Brandon Mayfield was arrested. His family was not told where he was being held. He was told, and his family was told, that he was being held as a primary suspect on offenses punishable by death.

20. On May 19th, the SNP advised the FBI, and on May 20th news reports revealed, that Spain had matched the Madrid fingerprint with an Algerian, Mr. Ouhanc Daoud. The FBI now admits that its fingerprint identification of Brandon Mayfield was an error, and, incredibly, the FBI now states that LFP # 17 is "of no value for identification purposes."

21. This lawsuit seeks to affirm that not even a "War on Terror" allows the federal government to deprive U.S. citizens of their constitutionally protected rights to liberty and to enjoy the privacy and security of their homes and offices.

CLAIM FOR DECLARATORY RELIEF

22. Plaintiffs reallege and incorporate herein paragraphs 1 -23, above.

23. Pursuant to FISA, as amended by the Patriot Act, Plaintiffs were subjected to covert surveillance and searches of their family home, law office, vehicles, and communications. Pursuant to FISA, as amended by the Patriot Act, the information collected by said covert surveillance and searches was maintained in government files, and

derivative FISA materials were distributed to certain government agencies and departments outside the DOJ and derivative materials remain in government files.

24. Plaintiffs, through their lawyers, demanded that Defendant reveal to Plaintiffs the FISA applications, FISA orders and related documents, and further demanded Defendant remove from government files derivative FISA materials relating to Plaintiffs. Plaintiffs have insisted that FISA, as amended by the Patriot Act, is unconstitutional in the particulars set forth herein, and that therefore Defendant may not continue to retain derivative materials in government files. Defendant refuses to reveal to Plaintiffs the FISA applications, FISA orders and related documents pertaining to Plaintiffs. Defendant denies that FISA, as amended by the Patriot Act, is unconstitutional.

25. Defendant utilized the challenged provisions of FISA, as amended by the Patriot Act, to secretly collect, disseminate and retain information and communications seized from Plaintiffs ' home and law office. Because Defendant refuses to identify and destroy all derivative materials in government files as a result of the physical searches and electronic surveillance performed by the government, because Plaintiffs fear the future uses of the derivative materials in government files, because Plaintiffs fear future uses of FISA, as amended by the Patriot Act, and because Plaintiffs have no other plain, speedy or adequate remedy at law, Plaintiffs seek a declaratory judgment that 50 U.S.C. §§ 1804 and 1823, as amended by the Patriot Act, violate the Fourth Amendment of the United States Constitution, on their face, because they:

a. permit the federal government to perform covert physical searches and electronic surveillance and wiretaps of the home, office and vehicles of a person without first requiring the government to demonstrate to a court the existence of probable cause that the person has committed a crime;

b. permit the federal government to perform covert physical searches and electronic surveillance and wiretaps of a person without first requiring the government to demonstrate to a court that the primary purpose of the searches and surveillance is to obtain foreign intelligence information; and

c permit the federal government to covertly collect, disseminate and retain information collected through covert physical searches and electronic surveillance without first requiring the government to demonstrate to a court the existence of probable cause that the person who is the target of physical searches and electronic surveillance has committed a crime, or, alternatively, that the primary purpose of the searches and surveillance are to obtain foreign intelligence information.

WHEREFORE, Plaintiffs pray for issuance of a declaratory judgment as set forth above. Plaintiffs also seek their costs and disbursements necessarily incurred herein.

DATED this 27th day of November, 2006.

The Spence Law Firm, LLC
/s/Gerry Spence
Wyoming Bar No. 4-0657

Rosenthal & Greene, P.C.
/s/Elden M. Rosenthal
Oregon State Bar No. 72217

Michele Longo Eder, LLC
/s/Michele Longo Eder
Oregon State Bar No. 79305

Of Attorneys for Plaintiffs

APPENDIX F:

28 U.S.C. §§ 2201-2202

Title 28. Judiciary and Judicial Procedure
Chapter 151. Declaratory Judgments

§ 2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act.

§ 2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

APPENDIX G:

50 U.S.C. §§ 1804, 1823

Title 50. War and National Defense
Chapter 36. Foreign Intelligence Surveillance

§ 1804. Applications for court orders

(a) Submission by Federal officer; approval of Attorney General; contents

Each application for an order approving electronic surveillance under this subchapter shall be made by a Federal officer in writing upon oath or affirmation to a judge having jurisdiction under section 1803 of this title. Each application shall require the approval of the Attorney General based upon his finding that it satisfies the criteria and requirements of such application as set forth in this subchapter. It shall include--

(1) the identity of the Federal officer making the application;

(2) the identity, if known, or a description of the specific target of the electronic surveillance;

(3) a statement of the facts and circumstances relied upon by the applicant to justify his belief that--

(A) the target of the electronic surveillance is a foreign power or an agent of a foreign power; and

(B) each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power;

(4) a statement of the proposed minimization procedures;

(5) a description of the nature of the information sought and the type of communications or activities to be subjected to the surveillance;

(6) a certification or certifications by the Assistant to the President for National Security Affairs, an executive branch official or officials designated by the President from among those executive officers employed in the area of national security or defense and appointed by the President with the advice and consent of the Senate, or the Deputy Director of the Federal Bureau of Investigation, if designated by the President as a certifying official--

(A) that the certifying official deems the information sought to be foreign intelligence information;

(B) that a significant purpose of the surveillance is to obtain foreign intelligence information;

(C) that such information cannot reasonably be obtained by normal investigative techniques;

(D) that designates the type of foreign intelligence information being sought according to the categories described in section 1801(c) of this title; and

(E) including a statement of the basis for the certification that--

(i) the information sought is the type of foreign intelligence information designated; and

(ii) such information cannot reasonably be obtained by normal investigative techniques;

(7) a summary statement of the means by which the surveillance will be effected and a statement whether physical entry is required to effect the surveillance;

(8) a statement of the facts concerning all previous applications that have been made to any judge under this subchapter involving any of the persons, facilities, or places specified in the application, and the action taken on each previous application; and

(9) a statement of the period of time for which the electronic surveillance is required to be maintained, and if the nature of the intelligence gathering is such that the approval of the use of electronic surveillance under this subchapter should not automatically terminate when the described type of information has first been obtained, a description of facts supporting the belief that additional information of the same type will be obtained thereafter.

(10) Redesignated (9)

(11) Repealed. Pub.L. 110-261, Title I, § 104(1)(A), July 10, 2008, 122 Stat. 2460

(b) Additional affidavits or certifications

The Attorney General may require any other affidavit or certification from any other officer in connection with the application.

(c) Additional information

The judge may require the applicant to furnish such other information as may be necessary to make the determinations required by section 1805 of this title.

(d) Personal review by Attorney General

(1)(A) Upon written request of the Director of the Federal Bureau of Investigation, the Secretary of Defense, the Secretary of State, the Director of National Intelligence, or the Director of the Central Intelligence Agency, the Attorney General shall personally review under subsection (a) of this section an application under that subsection for a target described in section 1801(b)(2) of this title.

(B) Except when disabled or otherwise unavailable to make a request referred to in subparagraph (A), an official referred to in that subparagraph may not delegate the authority to make a request referred to in that subparagraph.

(C) Each official referred to in subparagraph (A) with authority to make a request under that subparagraph shall take appropriate actions in advance to ensure that delegation of such authority is clearly established in the event such official is disabled or otherwise unavailable to make such request.

(2)(A) If as a result of a request under paragraph (1) the Attorney General determines not to approve an application under the second sentence of subsection (a) of this section for purposes of making the application under this section, the Attorney General shall provide written notice of the determination to the official making the request for the review of the application under that paragraph. Except when

disabled or otherwise unavailable to make a determination under the preceding sentence, the Attorney General may not delegate the responsibility to make a determination under that sentence. The Attorney General shall take appropriate actions in advance to ensure that delegation of such responsibility is clearly established in the event the Attorney General is disabled or otherwise unavailable to make such determination.

(B) Notice with respect to an application under subparagraph (A) shall set forth the modifications, if any, of the application that are necessary in order for the Attorney General to approve the application under the second sentence of subsection (a) of this section for purposes of making the application under this section.

(C) Upon review of any modifications of an application set forth under subparagraph (B), the official notified of the modifications under this paragraph shall modify the application if such official determines that such modification is warranted. Such official shall supervise the making of any modification under this subparagraph. Except when disabled or otherwise unavailable to supervise the making of any modification under the preceding sentence, such official may not delegate the responsibility to supervise the making of any modification under that preceding sentence. Each such official shall take appropriate actions in advance to ensure that delegation of such responsibility is clearly established in the event such official is disabled or otherwise unavailable to supervise the making of such modification.

§ 1823. Application for order

(a) Submission by Federal officer; approval of

Attorney General; contents

Each application for an order approving a physical search under this subchapter shall be made by a Federal officer in writing upon oath or affirmation to a judge of the Foreign Intelligence Surveillance Court. Each application shall require the approval of the Attorney General based upon the Attorney General's finding that it satisfies the criteria and requirements for such application as set forth in this subchapter. Each application shall include--

(1) the identity of the Federal officer making the application;

(2) the identity, if known, or a description of the target of the search, and a description of the premises or property to be searched and of the information, material, or property to be seized, reproduced, or altered;

(3) a statement of the facts and circumstances relied upon by the applicant to justify the applicant's belief that--

(A) the target of the physical search is a foreign power or an agent of a foreign power;

(B) the premises or property to be searched contains foreign intelligence information; and

(C) the premises or property to be searched is or is about to be owned, used, possessed by, or is in transit to or from a foreign power or an agent of a foreign power;

(4) a statement of the proposed minimization procedures;

(5) a statement of the nature of the foreign intelligence sought and the manner in which the physical search is to be conducted;

(6) a certification or certifications by the Assistant to the President for National Security Affairs, an executive branch official or officials designated by the President from among those executive branch officers employed in the area of national security or defense and appointed by the President, by and with the advice and consent of the Senate, or the Deputy Director of the Federal Bureau of Investigation, if designated by the President as a certifying official--

(A) that the certifying official deems the information sought to be foreign intelligence information;

(B) that a significant purpose of the search is to obtain foreign intelligence information;

(C) that such information cannot reasonably be obtained by normal investigative techniques;

(D) that designates the type of foreign intelligence information being sought according to the categories described in section 1801(e) of this title; and

(E) includes a statement explaining the basis for the certifications required by subparagraphs (C) and (D);

(7) where the physical search involves a search of the residence of a United States person, the Attorney General shall state what investigative

techniques have previously been utilized to obtain the foreign intelligence information concerned and the degree to which these techniques resulted in acquiring such information; and

(8) a statement of the facts concerning all previous applications that have been made to any judge under this subchapter involving any of the persons, premises, or property specified in the application, and the action taken on each previous application.

(9) Redesignated (8)

(b) Additional affidavits or certifications

The Attorney General may require any other affidavit or certification from any other officer in connection with the application.

(c) Additional information

The judge may require the applicant to furnish such other information as may be necessary to make the determinations required by section 1824 of this title.

(d) Personal review by Attorney General

(1)(A) Upon written request of the Director of the Federal Bureau of Investigation, the Secretary of Defense, the Secretary of State, the Director of National Intelligence, or the Director of the Central Intelligence Agency, the Attorney General shall personally review under subsection (a) of this section an application under that subsection for a target described in section 1801(b)(2) of this title.

(B) Except when disabled or otherwise unavailable to make a request referred to in subparagraph (A), an

official referred to in that subparagraph may not delegate the authority to make a request referred to in that subparagraph.

(C) Each official referred to in subparagraph (A) with authority to make a request under that subparagraph shall take appropriate actions in advance to ensure that delegation of such authority is clearly established in the event such official is disabled or otherwise unavailable to make such request.

(2)(A) If as a result of a request under paragraph (1) the Attorney General determines not to approve an application under the second sentence of subsection (a) of this section for purposes of making the application under this section, the Attorney General shall provide written notice of the determination to the official making the request for the review of the application under that paragraph. Except when disabled or otherwise unavailable to make a determination under the preceding sentence, the Attorney General may not delegate the responsibility to make a determination under that sentence. The Attorney General shall take appropriate actions in advance to ensure that delegation of such responsibility is clearly established in the event the Attorney General is disabled or otherwise unavailable to make such determination.

(B) Notice with respect to an application under subparagraph (A) shall set forth the modifications, if any, of the application that are necessary in order for the Attorney General to approve the application under the second sentence of subsection (a) of this section for purposes of making the application under this section.

(C) Upon review of any modifications of an application set forth under subparagraph (B), the official notified of the modifications under this paragraph shall modify the application if such official determines that such modification is warranted. Such official shall supervise the making of any modification under this subparagraph. Except when disabled or otherwise unavailable to supervise the making of any modification under the preceding sentence, such official may not delegate the responsibility to supervise the making of any modification under that preceding sentence. Each such official shall take appropriate actions in advance to ensure that delegation of such responsibility is clearly established in the event such official is disabled or otherwise unavailable to supervise the making of such modification.

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(2)

Supreme Court, U.S.
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No. 09-1561

In the Supreme Court of the United States

BRANDON MAYFIELD, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

EDWIN S. KNEEDLER
Deputy Solicitor General
Counsel of Record

TONY WEST
Assistant Attorney General

DOUGLAS N. LETTER
SCOTT R. MCINTOSH
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly held that petitioners lack Article III standing to seek a declaratory judgment regarding the constitutionality of provisions of the Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C. 1801 *et seq.*, where petitioners' only asserted injury is the government's possession of materials derived from the fruits of FISA surveillance and searches, a declaratory judgment would not require the government to divest itself of those derivative materials, and petitioners have released any claim to any other relief as part of a settlement agreement.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 58a-74a) is reported at 599 F.3d 964. The opinion of the district court (Pet. App. 1a-40a) is reported at 504 F. Supp. 2d 1023.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 2010. A petition for rehearing was denied on that date (Pet. App. 58a-59a). The petition for a writ of certiorari was filed on June 22, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In March 2004, terrorists detonated bombs in Madrid, Spain, killing nearly 200 people. Spanish investigators sent the Federal Bureau of Investigation (FBI)

fingerprints found on items connected to the bombers. The FBI erroneously concluded that one of the fingerprints belonged to petitioner Brandon Mayfield (Mayfield), an American citizen who lives in Oregon. In subsequent proceedings, an independent fingerprint expert selected by Mayfield and appointed by the district court handling the matter made the same erroneous identification. Pet. App. 61a-63a.

The FBI sought and obtained judicial orders authorizing electronic surveillance and physical searches of Mayfield's home and office. Pet. App. 62a. The orders were issued under the Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C. 1801 *et seq.* FISA establishes a number of prerequisites that must be satisfied before the Foreign Intelligence Surveillance Court may authorize electronic surveillance and physical searches. Among other things, the court must find probable cause to believe that the target of the surveillance or search is a foreign power or agent of a foreign power, and that the foreign power or agent is using any facilities or places to be surveilled and owns, uses, or possesses any property to be searched. 50 U.S.C. 1805(a)(2), 1824(a)(2) (Supp. II 2008). In addition, the government must certify, *inter alia*, that the collection of foreign intelligence information is a "significant purpose" of the surveillance or search. See 50 U.S.C. 1804(a)(6)(B), 1823(a)(6)(B) (Supp. II 2008). The significant-purpose standard was added to FISA in 2001 by the USA PATRIOT Act. See Pub. L. No. 107-56, § 218, 115 Stat. 291.

After the execution of the FISA orders, Mayfield was arrested and held in federal custody for two weeks as a material witness in a grand jury investigation. While Mayfield was being held, the Spanish investigators de-

termined that the fingerprint in question belonged to an Algerian terrorist. Mayfield was thereupon released from custody. Mayfield was not charged with a criminal offense. Pet. App. 63a.

2. Mayfield, his wife, and children (collectively, petitioners) filed suit against the United States and several FBI officials in the District of Oregon. Petitioners sought damages for unlawful arrest and imprisonment and unlawful searches and seizures. They also sought declaratory and injunctive relief against the Department of Justice and the FBI regarding the court-authorized surveillance and physical searches under FISA. Pet. App. 63a-64a.

a. The parties eventually negotiated (and the district court approved) a settlement agreement which resolved all but one of the issues in this case. Pet. App. 75a-83a. The government agreed to: (1) pay petitioners two million dollars; (2) apologize to petitioners; (3) return copies of "material witness materials"; and (4) destroy the "FISA take"—*i.e.*, the intercepts and materials obtained by the FBI pursuant to the FISA-authorized surveillance and searches targeting Mayfield. *Id.* at 76a-77a.[1] The agreement specifically defined the government's obligation to destroy or otherwise dispose of such materials as not extending to any "derivative FISA materials"—*i.e.*, materials derived directly or indirectly

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[1] For purposes of the settlement agreement, "FISA take" is specifically defined as: (1) "the communications intercepts that were acquired by the FBI pursuant to the FISA electronic surveillance authority targeting Brandon Mayfield" and (2) "the materials that were seized or reproduced by the FBI pursuant to the FISA physical search authority targeting Brandon Mayfield." Pet. App. 78a. The "material witness materials" related to non-FISA searches conducted in connection with the material witness proceeding. *Ibid.*

from the FISA take. *Id.* at 78a.[2] It is undisputed that the government has performed all of its obligations under the settlement agreement.

In return for these undertakings, petitioners released all but one specified claim: the claim that "50 U.S.C. 1804 (relating to electronic surveillance under the Foreign Intelligence Surveillance Act) and 50 U.S.C. 1823 (relating to physical searches under such Act) violate the Fourth Amendment on their face." Pet. App. 79a-80a. The settlement agreement stated that that is "the sole claim that is not released as part of th[e] settlement and that is in issue in [the] Amended Complaint." *Id.* at 79a.

Under the court-approved agreement, the only relief that petitioners may seek on that remaining claim is a declaratory judgment that the challenged provisions violate the Fourth Amendment. Pet. App. 80a. The agreement thus expressly precludes the entry of any injunctive relief or damages against the government. *Id.* at 76a. The government agreed that, if the district court were to enter an adverse declaratory judgment with respect to the constitutionality of Section 1804 or Section 1823, and that judgment were to become final and not subject to further review, the government would "not use such provision(s) with respect to" petitioners—*i.e.*, it would not subject petitioners to any further electronic surveillance or physical searches on the basis of those statutory provisions. *Id.* at 80a.

The settlement agreement provided that petitioners would file their amended complaint to litigate their re-

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[2] The agreement defines "derivative FISA materials" as "[a]ny materials, in whatever form or place, derived directly or indirectly from or related to the FISA take * * * that are not included within the * * * definition" of "FISA take." Pet. App. 78a.

maining Fourth Amendment claim. Pet. App. 80a. That complaint (*id.* at 84a-93a) does not allege that petitioners are at risk of being subjected to electronic surveillance or physical searches in the future. The settlement agreement further provided that the United States could raise any defenses and arguments in its opposition to petitioners' claim, including, but not limited to, lack of jurisdiction. *Id.* at 80a.

b. After the district court approved the settlement agreement, petitioners filed the agreed upon amended complaint. Pet. App. 84a-93a. In accordance with the settlement, the amended complaint claimed only that 50 U.S.C. 1804 and 1823 violate the Fourth Amendment "on their face" and disavowed any challenge to the provisions "as applied in respect to [petitioners]." Pet. App. 85a, 91a-92a. More specifically, petitioners argued that FISA's significant-purpose standard is facially unconstitutional in the absence of a showing of probable cause to believe that a FISA-authorized surveillance or search will produce evidence of a crime.

The United States moved to dismiss the amended complaint for want of Article III jurisdiction, arguing that petitioners lacked standing and that their claim was not ripe. Both parties also filed cross-motions for summary judgment.

c. The district court denied the government's motion to dismiss and granted summary judgment to petitioners. Pet. App. 1a-40a.

Before reaching the merits, the district court held that petitioners possessed Article III standing to pursue their facial Fourth Amendment claim. Pet. App. 19a-23a. The court concluded that the government's ongoing possession of derivative FISA materials constituted a cognizable Article III injury-in-fact. *Id.* at 20a-21a. The

court also concluded that petitioners' claim for declaratory relief satisfies Article III's redressibility requirement because "it is reasonable to assume that the Executive Branch of the government will act lawfully and make all reasonable efforts to destroy the derivative materials when a final declaration of the unconstitutionality of the challenged provisions is issued." *Id.* at 21a.

The district court proceeded to declare 50 U.S.C. 1804 and 1823 facially unconstitutional under the Fourth Amendment. Pet. App. 39a.[3] As contemplated by the settlement agreement, the court did not enter any injunctive relief.

3. The court of appeals reversed. Pet. App. 58a-74a. The court of appeals held that petitioners lacked the Article III standing necessary to pursue their claim. *Id.* at 66a-74a.

The court of appeals agreed with the district court that the government's ongoing possession of the derivative FISA materials constituted a cognizable Article III injury. Pet. App. 69a-70a. However, the court of appeals concluded that a declaratory judgment regarding the facial constitutionality of 50 U.S.C. 1804 and 1823—the only relief available to petitioners under the terms of the settlement agreement—would not redress that injury. Pet. App. 71a-74a.

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[3] Every other court to decide the issue, including the FISA Court of Review, has sustained the facial constitutionality of the provisions at issue in this case. See, *e.g.*, *In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002); *In re Directives Pursuant to Section 105B of the FISA*, 551 F.3d 1004 (FISA Ct. Rev. 2008); *United States* v. *Wen*, 477 F.3d 896, 898-899 (7th Cir. 2007); *United States* v. *Damrah*, 412 F.3d 618, 625 (6th Cir. 2005); *United States* v. *Abu-Jihaad*, 531 F. Supp. 2d 299, 304 (D. Conn. 2008); *United States* v. *Mubayyid*, 521 F. Supp. 2d 125, 139-141 (D. Mass. 2007); *United States* v. *Holy Land Found. for Relief & Dev.*, No. 3:04-CR-240-G, 2007 WL 2011319 (N.D. Tex. July 11, 2007).

The court of appeals explained that the use of material seized in violation of the Fourth Amendment "does not *per se* violate the Constitution." Pet. App. 71a (citing, *inter alia*, *Pennsylvania Bd. of Probation & Parole* v. *Scott*, 524 U.S. 357, 362 (1998)). The court thus reasoned that a declaratory judgment that FISA's significant-purpose standard violates the Fourth Amendment "would [not] make it unlawful for the government to continue to retain the derivative materials" and would not require the government "to destroy or otherwise abandon the materials." *Id.* at 71a-72a. In other words, "[t]he government will not be required [by a declaratory judgment] to act in any way that will redress [petitioners'] past injuries or prevent likely future injuries." *Id.* at 72a. The court therefore held that, "in light of the unique circumstances of this case"—where petitioners have "bargained away all * * * forms of relief" other than a declaratory judgment and any available declaration would place the government "under no legal obligation" to turn over or destroy the derivative materials—petitioners failed to satisfy the redressibility prong of Article III's standing test. *Id.* at 73a-74a.

ARGUMENT

The court of appeals' conclusion that petitioners lack Article III standing is correct and does not conflict with any decision of this Court or any other court of appeals. That jurisdictional ruling is, by its very terms, a *sui generis* one that rests on "the unique circumstances of this case." Pet. App. 73a. No further review of that fact-bound ruling is warranted.

1. A plaintiff must establish his Article III standing to sue by carrying the burden of showing that: (1) he has suffered a "concrete and particularized" injury;

(2) there is "a causal connection between the injury" and the defendant's conduct; and (3) the injury likely will be redressed by his requested relief. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). With respect to the last prong of this inquiry, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 561 (citation omitted). Moreover, because "standing is not dispensed in gross," a plaintiff "must demonstrate standing separately for each form of relief sought." *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000) (citation and brackets omitted). That principle has particular salience when a plaintiff who has suffered an injury in the past seeks prospective relief such as an injunction or a declaratory judgment. The existence of a past injury can confer standing to seek money damages, but it does not follow that the plaintiff will therefore have standing to seek prospective relief as well. See, *e.g.*, *City of L.A.* v. *Lyons*, 461 U.S. 95, 102-105, 109 (1983).

In this case, the court of appeals correctly held that petitioners failed to establish that their alleged injury would be redressed by a declaratory judgment. In their settlement agreement with the United States, petitioners released all claims other than their challenge to the facial constitutionality of 50 U.S.C. 1804 and 1823. And, with respect to that claim, petitioners bargained away their right to any relief other than a declaratory judgment regarding the facial constitutionality of those provisions. The district court therefore could not (and did not) issue an injunction requiring the United States to turn over or destroy the derivative FISA materials, nor could it (or did it) issue a declaratory judgment regarding the legality of the government's retention of those

materials. The only possible remedy available was a declaration that 50 U.S.C. 1804 and 1823 are unconstitutional on their face. And as the court of appeals recognized, such a declaration would do nothing to redress petitioners' only asserted Article III injury: the government's continued possession of derivative FISA materials.

The district court assumed that if it declared the significant-purpose standard of 50 U.S.C. 1804 and 1823 to be facially unconstitutional, the government would have to divest itself of the derivative FISA materials in order to conform to the declaration. But as the court of appeals explained, that assumption is incorrect. Pet. App. 71a-73a. This Court has repeatedly made clear that, outside of the context of criminal trials, the government is generally free to use evidence obtained in an unlawful search. See, *e.g.*, *Pennsylvania Bd. of Probation & Parole* v. *Scott*, 524 U.S. 357, 362 (1998) (explaining that the Court has continually declined to extend the exclusionary rule to proceedings other than criminal trials); *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1034, 1050 (1984) (unlawfully obtained materials generally may be used against an alien in civil immigration proceedings); *United States* v. *Calandra*, 414 U.S. 338, 347-452 (1974) (explaining that exclusionary rule "has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons" and refusing to extend exclusionary rule to grand jury proceedings). That principle applies with particular force to materials merely *derived* from such evidence. Accordingly, even if the statutory provisions at issue in this case were held to violate the Fourth Amendment, the government could still retain the derivative materials and would not have

to destroy them in order to—in the district court's words—"act lawfully," Pet. App. 21a.

The point is not that the government was unwilling to abide by the terms of the declaratory judgment sought by petitioners, or that petitioners lack standing because the district court is without power to compel compliance with such a declaration. The court of appeals did not hold, and the government has not argued in this case, that an Article III injury generally cannot be redressed by a declaratory judgment unless injunctive relief is available to enforce the declaration. The critical point is, rather, that compliance with the declaration simply will not redress petitioners' injury in this case. Because it is not unlawful for the government to retain and use materials obtained through unconstitutional searches (or, in the case of derivative materials, as a result of such searches), the government would not have to destroy the derivative FISA materials in order to conform to the declaration. Accordingly, as the court of appeals recognized, it is not "likely, as opposed to merely speculative, that [petitioners'] injury will be redressed" (*Lujan*, 504 U.S. at 561 (internal quotation marks omitted)) by a declaratory judgment, and petitioners therefore lack standing under Article III.

2. a. Petitioners assert that the court of appeals erroneously required them to show that a declaratory judgment "would *guarantee* redress." Pet. 24 (emphasis added). That assertion is incorrect. The court of appeals explicitly framed its redressibility inquiry in terms of whether declaratory relief "will *likely* redress [petitioners'] injury"—the standard adopted by this Court in *Lujan* and other cases, and the same standard on which

petitioners themselves rely. Pet. App. 71a (emphasis added).[4]

b. Petitioners argue (Pet. 28-36) that the Declaratory Judgment Act, 28 U.S.C. 2201, explicitly contemplates that declaratory relief may be awarded "whether or not further relief is or could be sought." 28 U.S.C. 2201(a). The court of appeals' Article III holding is fully consistent with that statutory provision.

The potential availability of relief under the Declaratory Judgment Act where injunctive relief "is [not] or could [not] be sought" reflects the fact that declaratory relief may suffice to redress a plaintiff's injuries in a particular case. In many cases, a declaratory judgment may reasonably be expected to alter the defendant's future conduct without the entry of an injunction to enforce the declaratory judgment. In such cases, even if injunctive relief is unavailable for one reason or another, Article III is no obstacle to the entry of a declaratory judgment—provided, that is, that voluntary compliance with the declaration will redress the plaintiff's injury in whole or in part.

The outcome here is different because, for the reasons discussed above, the particular injury in this case will not be redressed even if the government *does* comply with the declaratory judgment left open by the set-

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[4] Petitioners alternatively suggest (Pet. 6) that this Court's decision in *Rakas* v. *Illinois*, 439 U.S. 128 (1978), entirely discarded reliance on concepts of "standing" in the Fourth Amendment context. *Rakas*, however, simply concluded that what has been called a criminal defendant's "standing" to assert Fourth Amendment rights as a means of seeking the suppression of inculpatory evidence is "more properly subsumed under substantive Fourth Amendment doctrine." *Id.* at 138-139. That conclusion does not affect the analysis in this civil case where the suppression of evidence is not at issue.

tlement agreement. As a result, the decision below is consistent both with the Declaratory Judgment Act itself and with the cases cited by petitioners (Pet. 29-32) that have awarded declaratory relief against the government and other defendants while withholding injunctive relief. And because the court of appeals' decision is tied to the particular facts, claims, and settlement terms in this case, it provides no basis for petitioners' professed fear (Pet. 33) that defendants will be able to obtain dismissal of declaratory judgment actions for lack of standing simply because no injunction has been obtained.

Alternatively, petitioners suggest (Pet. 35-36) that the district court actually had the power to issue an injunction against retention of the derivative FISA materials. That suggestion is contrary to the understanding of the court of appeals and the district court itself.[5] Moreover, it is inconsistent with the express terms of the settlement agreement. That agreement provides that "the s[o]le[6] relief that will be awarded should [petitioners] prevail on [their constitutional] claim is a declaratory judgment" that 50 U.S.C. 1804 and 1823 are facially unconstitutional. Pet. App. 80a. In return for the payment of two million dollars and other specified

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[5] Petitioners assert (Pet. 28) that "[t]he Court of Appeals conceded that the district court had the authority to issue an injunction against the government." But far from "conceding" that point, the court of appeals took precisely the opposite view: "Having bargained away all other forms of relief, [petitioners are] now entitled only to a declaratory judgment." Pet. App. 73a.

[6] The reproduction of the settlement agreement in the appendix to the petition includes a few typographical errors not present in the original. Compare, *e.g.*, C.A. E.R. 53 (photocopy of settlement agreement discussing the "sole relief" available) with Pet. App. 80a ("sale relief").

actions by the government (*id.* at 76a-77a), petitioners explicitly released the United States from "all [other] claims, demands, rights, and causes of action of whatsoever kind and nature for monetary, *injunctive*, declaratory, or any other form of relief." *Id.* at 76a (emphasis added). Petitioners cite no authority, and we know of none, for the proposition that the district court retained the power to enter an injunction after petitioners themselves bargained away that relief. Accordingly, while a declaratory judgment may serve as the predicate for subsequent injunctive relief in other cases (*id.* at 35a), it cannot do so in "the unique circumstances of this case" (*id.* at 73a).

c. Petitioners assert (Pet. 10-18) that if the government seizes an individual's property in violation of the Fourth Amendment, its continued possession of the seized property is itself a violation of the Fourth Amendment, and hence a declaration that 50 U.S.C. 1804 and 1823 are unconstitutional would implicitly render the government's retention of the derivative FISA materials unconstitutional as well. As noted above, however, see p. 9, *supra*, a determination that material was unlawfully seized from petitioners would not provide a basis for ordering the destruction or return of derivative materials that were not seized from petitioners.

The materials that were seized—what the settlement agreement refers to as the "FISA take"—were destroyed by the government, in accordance with the agreed-upon terms of the settlement agreement. See Pet. App. 76a, 78a. The petitioners instead want the government to destroy or turn over the derivative FISA materials. Those materials are derived from the FISA take (*id.* at 78a), and by definition exclude any materials

actually taken from petitioners. Thus, even if the Fourth Amendment categorically obligated the government to return unlawfully seized materials, that principle would not obligate the government to return the derivative materials at issue here.[7]

d. Finally, petitioners advance an entirely different theory of Article III injury and redressibility. They profess to fear that the government may in the future subject Mayfield to electronic surveillance or physical searches under FISA. Petitioners assert that this subjective fear constitutes an injury for purposes of Article III. And they reason that a declaratory judgment that 18 U.S.C. 1804 and 1823 are unconstitutional will redress that supposed injury. Pet. 19-23.

That Article III theory is misconceived on its own terms.[8] But it is in any event irrelevant here, because petitioners never presented it to the court of appeals. The only injury that petitioners asserted was the govern-

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[7] Rule 41(g) of the Federal Rules of Criminal Procedure (see Pet. 16), which permits persons aggrieved by the seizure of property to move for "the property's return," is irrelevant for the same reason.

[8] Although the amended complaint states that petitioners "fear future uses of FISA" (Pet. App. 91a), the complaint does not allege that the government is likely to subject petitioners to searches or surveillance under FISA in the future. Moreover, the agreement provides that the facial constitutional claim will be litigated on the basis of stipulated facts, and the factual stipulation here does not suggest that it is likely that petitioners will be subject to future FISA surveillance or searches. See C.A. E.R. 64-66. Given the statutory prerequisites for a FISA order, including probable cause to believe that the subject of the surveillance is an agent of a foreign power (see p. 2, *supra*), any suggestion that petitioners likely will be targeted under FISA in the future is highly speculative. For that reason, petitioners cannot predicate standing on the theory that a declaratory judgment would protect them from a "real and immediate threat" of future surveillance or searches. *Lyons*, 461 U.S. at 105.

ment's possession of the derivative FISA materials, and the only theory of redressibility that they advanced was the theory that a declaratory judgment would lead the government to destroy or otherwise divest itself of the materials. See Pet. C.A. Br. 39-45 (identifying "[t]he continued retention by government agencies of this material" as the only asserted Article III injury); *id.* at 45-50 (arguing that declaratory judgment would lead to destruction of the derivative materials). The court of appeals' decision therefore does not address whether petitioners' subjective fear of future surveillance is a cognizable injury under Article III and, if so, whether a declaratory judgment would redress that asserted injury. Because petitioners' fear-of-surveillance theory of standing was neither pressed nor passed upon below, review is not warranted. See *United States* v. *United Foods, Inc.*, 533 U.S. 405, 417 (2001); *United States* v. *Williams*, 504 U.S. 36, 41-43 (1992); see also *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1819 (2009) ("This Court * * * is one of final review, 'not of first view.'") (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

EDWIN S. KNEEDLER
Deputy Solicitor General

TONY WEST
Assistant Attorney General

DOUGLAS N. LETTER
SCOTT R. MCINTOSH
Attorneys

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IN THE

Supreme Court of the United States

BRANDON MAYFIELD, an individual, MONA MAYFIELD, an individual, and SHANE MAYFIELD, SHARIA MAYFIELD, and SAMIR MAYFIELD, individuals, by and through their *guardian ad litem* Mona Mayfield,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

ELDEN M. ROSENTHAL
ROSENTHAL & GREEN, P.C.
121 S.W. Salmon Street
Suite 1090
Portland, OR 97204
(503) 228-3015

GERRY SPENCE
THE SPENCE LAW FIRM, L.L.C.
15 South Jackson Street
P.O. Box 548
Jackson, WY 83001
(800) 967-2117

ANDRE M. MURA *
ROBERT S. PECK
JEFFREY R. WHITE
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
777 Sixth Street, N.W.
Suite 520
Washington, DC 20001
(202) 944-2860
andre.mura@cclfirm.com

Counsel for Petitioners

*Counsel of Record

Additional counsel listed on inside cover

MICHELE LONGO EDER
MICHELE LONGO EDER, L.L.C.
4 S.W. High Street
P.O. Box 1530
Newport, OR 97365
(541) 265-3337

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INTRODUCTION

The government, in its brief in opposition, does not deny the following:

- "[T]he Mayfields are in no way connected to [the terrorist attack on Spanish soil in 2004] that prompted the Foreign Intelligence Surveillance Act ["FISA"] searches and seizures" at issue here, and responsible parties have long been apprehended. (Pet. 2-3.)

- The government nonetheless retains, among other things not disclosed to the Mayfields, "photocopies or photographs of documents from confidential client files in Mayfield's law office, summaries and excerpts from the computer hard drives from the Mayfield law office and plaintiffs' personal computers at home, analysis of plaintiffs' personal bank records and bank records from Mayfield's law office, analysis of client lists, websites visited, family financial activity, summaries of confidential conversations between husband and wife, parents and children, and other private activities of a family's life within their home." (*Id.* at 5) (quoting App. 20a-21a).

- "These materials, in a derivative form, have been distributed to various government agencies." (*Id.* at 5) (quoting App. 20a-21a).

- The government has agreed that "if such a declaratory judgment is entered with respect to one or both of such provisions [of FISA] and becomes final and not subject to further judicial review, the United States shall not use

> such provision[s] with respect to the plaintiffs." (App. 79a-80a.)

What the government does say in response to the first question presented is that the Mayfields are wrong *on the merits*: the government does not "have to destroy the derivative FISA materials in order to conform to the [District Court's] declaration" (Br. in Opp'n 10; *see id.* at 9) because, in the government's and the Ninth Circuit's view, the government has the power to retain indefinitely sensitive materials in derivative form in which the Mayfields unquestionably have a possessory interest—even though it has *never* articulated a law enforcement justification for the continued retention. This response does not support the government's contention that this Court should deny review; rather, it reinforces the Mayfields' point that this Court's definitive guidance is sorely needed to resolve an important question on which the courts of appeals are conflicted: whether the Fourth Amendment is relevant to the reasonableness of a decision to refuse to relinquish seized property that the government has no articulable reason to retain. (*See* Pet. 10-16.)

Neither should the government's response to the second question presented dissuade this Court from accepting review. The government, for instance, stresses that the Mayfields "bargained away" the opportunity to request coercive relief. In its view, then, the Court of Appeals' conclusion that a declaration, standing alone, could not satisfy Article III redressability requirements is "fact-bound." (Br. in Opp'n 7.) But, as the government states elsewhere, the Court of Appeals also did not believe that the District Court had the power to issue

coercive relief *sua sponte*. (*Id.* at 12 & n.6; *see also* App. 74a) (noting "the absence of any authority on which the district court could rely to insist *sua sponte* that the derivative materials be returned or destroyed").[1] Thus, the Court of Appeals' conclusion that a declaration, if not coupled with coercive relief, could not redress the Mayfields' injuries does not hinge on the inability of the Mayfields to seek an injunction. Rather, it hinges on a deeply flawed understanding of a *district court's authority* to "declare the rights and other legal relations of any interested party seeking such a declaration, *whether or not further relief is or could be sought*." 28 U.S.C. § 2201 (emphasis added). Such a declaration of rights, standing alone, satisfies Article III redressability requirements in this case. The decision below thus undermines a core purpose of the Declaratory Judgment Act—to vest district courts with broad and flexible authority to remedy federal rights—and merits this Court's review.

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[1] The government is correct that the better reading of the Court of Appeals decision is that the Court of Appeals did not think the District Court could order such relief. (Br. in Opp'n 12 & n.5.) But it is wrong to suggest that the District Court shared this view. (*See id.*) The District Court's decision certainly does not compel that conclusion. What the decision suggests is that the District Court did not believe coercive relief was even necessary because the government would abide by the declaration, and the declaration itself was sufficient to redress the harms alleged. (App. 21a) ("If . . . the court enters a declaratory judgment finding the challenged portions of the Patriot Act unconstitutional, it is reasonable to assume that the Executive Branch of the government will act lawfully and make all reasonable efforts to destroy the derivative materials"); (*id.* at 23a) ("a declaratory judgment striking the challenged sections of FISA will require the Executive Branch to destroy or otherwise eliminate the derivative materials").

ARGUMENT

I.

The government plainly disagrees with the Mayfields as to whether it "would [] have to destroy the derivative FISA materials in order to conform to the [District Court's] declaration." (Br. in Opp'n 10.) It claims that it would not for the sole reason that it has the power to seize and keep indefinitely illegally acquired materials in derivative form in which the Mayfields have a possessory interest. It claims to have that power but it does not articulate a reason for retaining these materials, and no reason is apparent.

Whether it in fact has that authority is an issue raised by the first question presented. The Mayfields argued in their petition that,

> as an issue of great national importance, the Court of Appeals' conclusion that the Mayfields lack standing to claim the protections of the Fourth Amendment—here, for the return of materials containing sensitive information in which they have a possessory interest—is, in effect, a conclusion that the Fourth Amendment does not bar the government from keeping indefinitely property it has seized illegally, even where it has asserted no justification for doing so.

(Pet. 6.) They further explained that the Courts of Appeals are divided on this question. (Pet. 10-16.) Whereas several courts of appeals decisions support the government's view that the Fourth Amendment

is utterly irrelevant to the reasonableness of a decision to refuse to relinquish seized property once the government has no need for it, (Pet. 13 (citing *Lee v. City of Chicago*, 330 F.3d 456 (7th Cir. 2003))), others support the Mayfields' view that the Fourth Amendment is relevant and requires the return of property in which a person has a lawful possessory interest once the government no longer has a competing interest in retention (Pet. 11-12).

The government, in its response, fails to discuss any of these cases. Instead, it defends the Court of Appeals' decision on the merits. It argues, first, that the Court of Appeals is correct that the government would not have to divest itself of these materials (Br. in Opp'n 9) (stating that the Court of Appeals correctly rejected this "assumption") (citing App. 71a-73a); and second, "[*b*]*ecause*" the government has no such obligation, the Court of Appeals, in its view, correctly concluded that a declaratory judgment is not likely to cause the government to return the materials (*id.* at 10) (emphasis added). This assumption, the government insists, is sound because "[t]his Court has repeatedly made clear that, outside the context of criminal trials, the government is generally free to use evidence obtained in an unlawful search." (Br. in Opp'n 9 (citing *Pennsylvania Bd. of Prob. & Parole v. Scott*, 524 U.S. 357 (1998))). It notes, by way of example, that this Court has permitted the government to retain unlawfully obtained materials for use against an alien in civil immigration proceedings, and that such evidence may be used in grand jury proceedings. (*Id.* (citing *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1034, 1050 (1984), and *United States v. Calandra*, 414 U.S. 338, 347-52 (1974))).

Of course, these examples only serve to prove the Mayfields' point: whether the government may retain unlawfully obtained materials for future use must be tested against Fourth Amendment standards. (*See* Pet. 16.) Thus, for instance, in *Lopez-Mendoza*, 468 U.S. at 1034, the Court weighed the "costs and benefits . . . [of] applying the exclusionary rule in civil deportation hearings held by the INS." In *Calandra*, 414 U.S. at 349, "in deciding whether to extend the exclusionary rule to grand jury proceedings," the Court "weigh[ed] the potential injury to the historic role and functions of the grand jury against the potential benefits of the rule as applied in this context." The government in those cases articulated a specific law-enforcement need for retaining (and using) unlawfully obtained evidence.[2]

In contrast, here the Court of Appeals did not attempt "to find the proper balance between [] law enforcement interests [in retention] and the general citizen's interest in her property." *Lee*, 330 F.3d at 473 (Wood, J., concurring); *see, e.g.*, *Sovereign News Co. v. United States*, 690 F.2d 569, 677 (6th Cir. 1982) (balancing a business owner's property interest in copies of business records seized during a criminal investigation with the government's interests in retention, and concluding "when the government has held the copies for a 'reasonable time' and has no investigations in progress, it must return the copies as well as the originals") (citation omitted). It did not even ask why, after six years, the government continues to retain a vast trove of private information about the Mayfields, including

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[2] The government does not state that it is retaining these materials so that it can use them for the purposes contemplated by these cases.

photographs of the interior of the Mayfields' home, summaries of their intimate conversations, digital copies of their home and work computers, including websites visited, as well as documents from Mr. Mayfields' legal office, which are confidential and privileged. Instead, the Court of Appeals simply "assum[ed]" (Br. in Opp'n 9) that "it is not unlawful for the government to retain and use materials obtained through unconstitutional searches (or, in the case of derivative materials, as a result of such searches)." (Br. in Opp'n 10.) And, on this basis, it concluded that the declaration would not remedy the Mayfields' injuries.

To the contrary, a declaration is likely to remedy the Mayfield's injuries. As the Mayfields have explained (Pet. 7-8), the declaration would address the legality of searches and seizures under FISA. The legality is a consideration material to whether the retention is reasonable, because it speaks to which party may have a superior interest in the property. (*See* Pet. 7.) Where the retention is unreasonable, *i.e.*, where the interests in return outweigh the interests in retention, the Fourth Amendment itself requires the government to return the property. Thus a declaration of unconstitutionality would "likely" redress the Mayfields' injuries.

During this time in our history when concerns about terrorism may result in erroneous searches and arrests, as was visited upon the Mayfields, it is critically important that this Court provide guidance to the lower courts about the rights of law-abiding citizens wrongfully accused. Here, the Ninth Circuit's decision strikes the wrong balance and is contrary to decisions of several courts of appeals; it is

at odds with this Court's precedents, including *United States v. Place*, 462 U.S. 696 (1983);[3] and it raises a significant constitutional question meriting this Court's review. *See Lee*, 330 F.3d at 473 (Wood, J., concurring) ("[T]the protection of private property is a high enough value in the Constitution that I would hesitate long before I concluded that there were no constitutional restrictions on the State's power to seize property and keep it.").

II.

This Court should also hear the second question presented. The Court of Appeals' decision, if not reviewed, would undermine the flexibility that Congress intended in the Declaratory Judgment Act ("DJA"). As the petition demonstrates, Congress enacted the DJA to provide district courts with a more palatable alternative to the "strong medicine" of issuing injunctions against state and federal officials. (Pet. 29-32.) The Act is thus premised on the wisdom of relying on those officials to accept the court's final determination as to the constitutionality of the law and uphold the petitioner's federal rights. (*Id.* at 31.) This is, in fact, precisely the District Court's assessment. (*See* App. 21a.)

The issuance of a declaration concerning the Mayfields' constitutional rights would significantly increase the likelihood that they would obtain relief. (*See* Pet. 31.) Contrastly, allowing the lower court's

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[3] *Cf.* Advisory Committee's 1989 Notes on Fed. R. Crim. P. 41 (citing *United States v. Place* in support of the proposition that "reasonableness under all the circumstances must be the test when a person seeks to obtain the return of property"); (*see also* Pet. 16-18.).

decision to stand would undermine the flexibility that Congress intended to provide district courts with when it enacted the DJA. (*Id.* at 30.)

As the Mayfields have explained, the Court of Appeals erred in requiring them to show that the declaratory judgment "guarantee[s]" relief (Pet. 24), in contravention of the standard established by this Court requiring a showing of a "significant increase in the likelihood that the plaintiff would obtain relief." (*Id.* at 24-25 (quoting *Utah v. Evans*, 536 U.S. 452, 464 (2002))).

The government disputes this characterization, arguing that the Court of Appeals correctly applied the "likelihood" test. (Br. in Opp'n 10-11.) Yet the government, like the Court of Appeals, insists that the Mayfields lack standing without an injunction to "enforce" the declaratory judgment and "require" the government to return or destroy the derivative materials. (Br. in Opp'n 7 & 10.)

The petition, however, demonstrates that a declaratory judgment would increase the likelihood of redress, which is all that is required. None of the Mayfields' asserted bases for standing are unique to the facts of this case; rather, they call upon the Court to give effect to the broad purposes of Congress in enacting the DJA and to uphold the inherent authority of the district court in carrying out those aims.

A.

For instance, a declaratory judgment would increase the likelihood that the District Court would, in the event of non-compliance, *sua sponte* enter an

injunction resulting in the right of return or destruction of the materials. The Court of Appeals did not believe the District Court had this power. *See supra* at p. 3 n.1. But that cannot be correct: Congress expressly provided in the Declaratory Judgment Act that a district court retains jurisdiction over the case after issuing a declaration of rights so that the court can subsequently issue an injunction in order to effectuate its prior judgment. (Pet. 34.) Although the government disagrees (Br. in Opp'n 12), it fails to address *Starter Corp. v. Converse, Inc.*, 170 F.3d 286, 298-99 (2d Cir. 1999), which is cited in the petition (at 35). There, the Second Circuit upheld the district court's exercise of its discretionary authority under the DJA "to issue an injunction in order to preserve the benefits obtained by the prevailing party in [a] declaratory judgment action." The fact that the Mayfields agreed that *they* would not seek injunctive relief thus does not deprive the *district court* of its discretionary authority to act.

B.

An additional basis for standing is provided in the stipulation between the Mayfields and the government. The government agreed that if the Mayfields obtained an adverse declaratory judgment with respect to the constitutionality of §§ 1804 or 1823, and the judgment became final and not subject to further judicial review, the government "would not subject petitioners to any further electronic surveillance or physical searches on the basis of those statutory provisions." (Br. in Opp'n 4.)

The government argues that this basis for standing is "irrelevant" "because petitioners never

presented it to the court of appeals" and thus it did not pass on it. (Br. in Opp'n 14.) It was raised, however, as the government itself notes, in the Amended Complaint. (*Id.* at 14 n.8.) In addition, the District Court made note both of the Mayfields' allegations that they "fear future uses of FISA" against them and the government's response that that the "declaratory judgment would protect plaintiffs against future searches or surveillance targeting them under a struck-down provision." (App. 20a.) Similarly, the Court of Appeals stated that the Mayfields' purpose in seeking a declaratory judgment was "1) to prevent future uses of FISA against Mayfield; and 2) to force the government to return or destroy" the derivative materials." (App. 67a.) It noted that the government's position was that the "possibility of [such] future injuries" was speculative. (App. 68a.) Because the Court of Appeals found that the Mayfields satisfied the redressability requirement based on the government's retention of the materials, it did not address this separate basis for standing. (*See* App. 68a-69a.)

Such a commitment on the part of the government is a substantial benefit the Mayfields stand to gain if they succeed in obtaining a final judgment on their Fourth Amendment claims. It is part of the bargain that the government otherwise relies on.

The government now asserts that its commitment to the Mayfields is worth little, because, in view of the statutory safeguards surrounding the issuance of a FISA order, it is not likely to target the Mayfields in the future. (*See* Br. in Opp'n 14 n.8.) To the contrary, it is highly likely that the Mayfields would obtain the benefit they seek if they obtain a

declaratory judgment, because the government itself has promised that it will effectively enjoin itself from using FISA with respect to the Mayfields in the future if the declaration properly issues. (*See* App. 80a.)

Consequently, the Mayfields "personally would benefit in a tangible way" from the declaratory judgment, *Warth v. Seldin*, 422 U.S. 490, 508 (1975), and thus they satisfy the redressability requirement for Article III standing.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

October 4, 2010

Respectfully submitted,

Andre M. Mura*
Robert S. Peck
Jeffrey R. White
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
777 Sixth Street, N.W., Suite 520
Washington, DC 20001
(202) 944-2860
andre.mura@cclfirm.com

Elden M. Rosenthal
ROSENTHAL & GREEN, P.C.
121 S.W. Salmon Street
Suite 1090
Portland, OR 97204
(503) 228-3015

Gerry Spence
THE SPENCE LAW FIRM, L.L.C.
15 South Jackson Street
P.O. Box 548
Jackson, WY 83001
(800) 967-2117

Michele Longo Eder
MICHELE LONGO EDER, L.L.C.
4 S.W. High Street
P.O. Box 1530
Newport, OR 97365
(541) 265-3337

Counsel for Petitioners

*Counsel of Record